82-1551

No.

SUPREME COURT OF THE UNITED STATES

October, 1982

BRYANT ELECTRIC COMPANY, Et Al. - Petitioners

versus

MARY ELIZABETH KISER, Individually and as Ancilliary Administratrix of the Estate of Paul S. Kiser, Deceased, Individually and on Behalf of all Other Similarly Situated as a Class - - - - - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT C. EWALD
WYATT, TARRANT & COMBS
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel of Record for Petitioners and for Reynolds Metals Company

CHARLES S. CASSIS
MARK K. FEATHER
BROWN, TODD & HEYBURN
1600 Citizens Plaza
Louisville, Kentucky 40202

Attorneys for Bryant Electric Company

JOHN DAVID COLE
COLE, HARNED & BRODERICK
921 College Street
P. O. Box 1869
Bowling Green, Kentucky 42101

Attorneys for Southwire Company and Triangle PWC, Inc.

(Additional counsel on inside cover)

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

DONALD L. STEPNER
ADAMS, BROOKING & STEPNER
421 Garrard Street
Covington, Kentucky 41012
Attorneys for Columbia Cable & Wire Company

LEE O. FITCH
MILLER, SEARL & FITCH
300 Bank One Plaza
P. O. Box 950
Portsmouth, Ohio 45662
Attorneys for Hatfield Wire & Cable Company

WILLIAM V. JOHNSON
JOHNSON, CUSAK & BELL
Suite 1900
One North LaSalle Street
Chicago, Illinois 60602
Attorneys for Marmon Group

WILLIAM T. McCRACKEN
CRABBE, BROWN, JONES, POTTS & SCHMIDT
2500 One Nationwide Plaza
P. O. Box 15039
Columbus, Ohio 43215
Attorneys for General Electric Company

W. ANDREW PATTON
KOHNEN & KOHNEN
4500 Carew Tower
Cincinnati, Ohio 45202
Attorneys for John I. Paulding, Inc.

C. ALEX ROSE
HANDMAKER, WEBER, MEYER & ROSE
2300 Citizens Plaza
Louisville, Kentucky 40202
Attorneys for Pass & Seymour, Inc.

JACOB K. STEIN
BRUCE M. ALLMAN
PAXTON & SEASONGOOD
1700 Central Trust Tower
Cincinnati, Ohio 45202
Attorneys for Square D Company and Slater Electric Company, Inc.

JAMES M. WILES
WILES, DOUCHER, TRESSLER & VAN BUREN CO., L.P.A.
300 South Second Street
Columbus, Ohio 43215
Attorneys for Leviton Manufacturing Co. and Rhode Island Insulated Wire Company

I. QUESTION PRESENTED FOR REVIEW:

Whether the Court of Appeals may, consistent with principles of due process, rely upon an unidentified, unverified, anonymous letter written to a newspaper as a basis for reversing the decision of the District Court.

Petitioners contend that the Court should issue this writ to answer this question in the negative.

II. LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS:

Appellants:

Mary Elizabeth Kiser, Individually and as Ancilliary Administratrix of the Estate of Paul S. Kiser, Deceased, Individually and on Behalf of all Other Similarly Situated as a Class, and

Appellees:

*Bryant Electric Company
Reynolds Metals Company
Southwire Company
Triangle PWC, Inc.
Columbia Cable & Wire Company
Hatfield Wire & Cable Company
Marmon Group
General Electric Company
John I. Paulding, Inc.
Pass & Seymour, Inc.
Square D Company
Slater Electric Company, Inc.
Leviton Manufacturing Co.
Rhode Island Insulated Wire Company

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*List of parent, subsidiaries and affiliated corporations is set forth in the Appendix.

III. TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

October, 1982

No.

BRYANT ELECTRIC COMPANY, Et Al., - *Petitioners*

v.

MARY ELIZABETH KISER, Individually and as Ancilliary Administratrix of the Estate of Paul S. Kiser, Deceased, Individually and on Behalf of all Other Similarly Situated as a Class - *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

IV. OPINIONS BELOW:

The Opinion of the United States Court of Appeals for the Sixth Circuit is printed in the petitioners' Appendix at pages 11-52, and has been officially published at 695 F. 2d 207 (1982). The Order denying petitioners' motion for rehearing is at Appendix pages 53-55. The Opinion of the District Court is printed in the Appendix at pages 56-78, and has not been officially reported.

V. JURISDICTION

The date of the entry of the Judgment sought to be reviewed is July 21, 1982. The Petition for Re-

hearing was denied on December 23, 1982. This Court has jurisdiction to hear this case under the provisions of 28 U.S.C. §1254(1).

VI. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and court rules which are set out verbatim:

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Evidence, Rule 802:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by act of Congress.

Federal Rules of Evidence, Rule 901(a) General Provision:

The requirement of authentication or identification as a condition precedent to admissibility is

satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Federal Rules of Evidence, Rule 1101(a) Courts and Magistrates:

These rules apply to the United States District Courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States Court of Appeals, the United States Claims Courts, and to the United States Magistrates, in the actions, cases and proceedings and to the extent hereinafter set forth.

STATEMENT OF THE CASE

This case was filed as a class action in the United States District Court for the Eastern District of Kentucky. The basis for the District Court's jurisdiction was diversity under 28 U.S.C. §1332.

The Court of Appeals in reversing the case because of juror misconduct did so on the basis of an anonymous, unverified letter to the editor of a local newspaper. The petitioners were never permitted to cross-examine the alleged author of that letter nor was any opportunity ever provided to inquire into the veracity of that anonymous document. The Court of Appeals assumed, without proof, that it was what it purported to be.

The case arose from a fire which took place at the Beverly Hills Supper Club in Southgate, Kentucky, on May 28, 1978, where 165 persons were killed and

others injured. As a result of the injuries suits were brought against nearly 1,000 separate defendants. (Appendix, p. 56) Except for the allegations against the petitioners here all of the claims have been settled or dismissed, with settlements totalling more than $25,000,000.

Because the trial judge determined that it would be impossible to try the case against all defendants at the same time, he created several groups of defendants and indicated that the claims against each would be tried separately. Petitioners here were either manufacturers of aluminum electrical wire or of electrical devices (ordinary wall plugs and switches) designed to be attached to electric wire. (Appendix, p. 56)

The plaintiffs claimed that the connection of aluminum wire to electrical devices created a highly dangerous situation at the terminal point where the wire was wrapped under a screw which was then tightened to hold the wire in place and make electrical contact. Plaintiffs further claimed that the physical characteristics of aluminum wire made such a connection subject to overheating and created an extreme fire hazard which plaintiffs' counsel repeatedly likened to a "time bomb." (Appendix, pp. 14-16)

Plaintiffs were never able to identify the particular brand of wire or devices allegedly involved as the cause of the fire and were permitted by the trial court to proceed against a number of manufacturers on an industry-wide theory of liability. At the trial of this action the issues involved were bifurcated and the first issue presented to the jury was whether or not the

fire was caused by an aluminum wire connection of the type complained of by the plaintiffs. (Appendix, p. 13). The jury found for the petitioners on this issue and the Complaint against these petitioners was dismissed. (Appendix, p. 15)

Expert witnesses testifying for the plaintiffs described the alleged failure mechanism in aluminum wire. They agreed that while the failure rate for these connections might be only one in 200, such a rate was not acceptable and was unreasonably dangerous. They described the failure as a gradual process where overheating and loosening of the connection occurred before dangerous heat developed and explained how a connection could be checked for signs of heating or loosening. (Appendix, p. 14)

Early in the trial one of the jurors who had aluminum wire in his own home checked "a couple" of his own outlets for danger signs and found none. He mentioned this on one occasion, the next day, to other jurors during a recess. Five jurors reported hearing this comment on one occasion only. The matter was never discussed while the jury was deliberating together. The transcript of this juror's testimony at a post-trial hearing is included in the Appendix at pages 79-83.

The trial which was characterized by the district judge as "highly technical, complex and prolonged," began on December 3, 1979, and was submitted to the jury on February 20, 1980. The trial court's Opinion is set forth in the Appendix (pp. 56-78) and describes the setting of the trial in some detail.

Following the jury verdict in favor of the defendants, an anonymous letter was written to a local newspaper. The writer claimed to be a member of the jury and attempted to explain the basis for the verdict. The explanation included comment upon the aluminum wire in the writer's home. The author of this letter was never identified. (Appendix, pp. 16-18)

A motion for a new trial was filed alleging juror misconduct and relying upon the anonymous letter. The trial court conducted a hearing where each juror was put under oath and examined by the court. Counsel were not permitted to ask the jurors questions. One juror admitted checking a couple of outlets because of his concern for the safety of his family. His sworn testimony was inconsistent with facts stated in the anonymous letter, yet the Court of Appeals relied on the accuracy of statements in the anonymous letter. No juror was asked any questions about authorship of the anonymous letter, the trial judge being of the opinion that Rule 606(b) of the Federal Rules of Evidence barred such inquiry. (Appendix, pp. 62-63)

The author of the anonymous letter has never been identified. There is no basis whatsoever to find that the anonymous letter was written by any juror, as any attorney involved in the case, courtroom personnel, spectators, media reporters or anyone else who had followed the trial in the newspapers had knowledge of information expressed in the letter. The petitioners were never given the opportunity to examine anyone regarding the authenticity of the anonymous letter or the juror who allegedly authored that letter.

The Court of Appeals reversed the case based on juror misconduct. The court printed the anonymous letter verbatim as a part of its decision. (Appendix, pp. 16-18) The court stated, without qualification, that this letter was written by a juror, although there was no proof whatsoever in the record to verify this statement. The court stated that "the juror's letter made clear that the results of his investigation were a factor in his decision-making." It was on this basis that the court reversed the lower court's Opinion and ordered a new trial. (Appendix, p. 22)

It is the position of the petitioners here that the Court of Appeals heavy reliance upon the anonymous letter was a violation of due process of law in conflict with decisions of this court, other courts of appeals, and the Federal Rules of Evidence.

ARGUMENT

Previous decisions by this Court have held that the right to confront and cross-examine witnesses is fundamental to our concept of due process. *Smith* v. *Illinois,* 390 U. S. 129 (1968); *In Re Oliver,* 333 U. S. 257 (1948); *Snyder* v. *Massachusetts,* 291 U. S. 97 (1934); *Alford* v. *United States,* 282 U. S. 687 (1931). Indeed, there are few subjects upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trials which is this country's constitutional goal. *Barber* v. *Page,* 390 U. S. 719 (1968); *Pointer* v. *Texas,* 380 U. S. 400,

405 (1965). In almost every setting where important decisions turn on questions of fact, due process requires the right to confront and cross-examine adverse witnesses. *Goldberg* v. *Kelly,* 397 U. S. 254 (1970).

As this court stated in *Brookhart* v. *Janis,* 384 U. S. 1, 3 (1965), a denial of cross-examination without waiver "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Certain principles have remained relatively immutable in our jurisprudence. We have formalized these protections in the requirements of confrontation and cross-examination. This Court has been zealous to protect these rights from erosion. *Greene* v. *McElroy,* 360 U. S. 474, 496-497 (1959).

In this case the petitioners have been absolutely denied their right to examine the writer of the anonymous letter upon which the Court of Appeals has relied. The petitioners have even been denied their right of cross-examination to determine whether or not this letter was actually written by a juror, a fact which the Court of Appeals has assumed without any evidence whatsoever. The Federal Rules of Evidence, 802, specifically preclude hearsay evidence, which this letter obviously is, unless that evidence fits in one of the specified exceptions, which this letter does not. Nor do the Federal Rules of Evidence, 901(a), permit documents to be considered as evidence unless they are verified or identified in such a way as to make their legitimacy highly probable. The Federal Rules of Evidence, 1101(a), apply to the Courts of Appeals.

Other federal courts have specifically held that an anonymous letter regarding juror misconduct has absolutely no value in considering that issue and whether to reverse a judgment as a result. *Fritz* v. *Boland & Cornelius,* 287 F. 2d 84 (2nd Cir. 1961).

A constitutional error of the first magnitude has occurred in this case, making it an appropriate one for review by this Court. The due process rights here involved are not limited in their application to criminal matters. In *Carter* v. *Kubler,* 320 U. S. 243 (1943), *rh'g denied* 320 U. S. 814, the Court held that the failure to allow cross-examination was inconsistent with the due process right to a full and fair hearing. Denial of due process rights in administrative hearings has also caused this Court to consider the cases and reverse when necessary. *Reilly* v. *Pinkus,* 338 U. S. 269 (1949). Likewise, the Court considered the similar denial of due process rights in a hearing involving admission to the bar in *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96 (1963). The importance of fundamental due process rights has caused the Court to consider their violations in matters involving the taking of property as well as other types of cases. *Fuentes* v. *Shevin,* 407 U. S. 67 (1972), *rh'g denied* 409 U. S. 902; *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Bell* v. *Burson,* 402 U. S. 535 (1971).

The error here of basing an opinion and reversing a case upon an unverified, unsigned, anonymous letter to a newspaper is obvious . These petitioners are unable to understand or explain the basis which the Court

of Appeals used in assuming that this letter was written by a juror. The court did not explain or attempt to explain how it was able to rely on this letter. We believe that the violation here is so severe and extreme as to call for the intervention of this Court, if for no other reason than because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

In this case where the potential liability is in terms of hundreds of millions of dollars petitioners believe their fundamental due process rights, which have unquestionably been violated in this case, deserve the protection of this court. If the Court of Appeals can flagrantly violate those rights without explanation in this case it may do so in others. It is appropriate, therefore, that this petition for certiorari be granted.

Respectfully submitted,

ROBERT C. EWALD
WYATT, TARRANT & COMBS
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel of Record for Petitioners and for Reynolds Metals Company

APPENDIX A

Nos. 80-3320
80-3358/59/60

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: BEVERLY HILLS FIRE LITIGATION
MARY ELIZABETH KISER, Individually and as Ancilliary Administratrix of the Estate of Paul S. Kiser, deceased, Individually and on behalf of all others similarly situated hereinafter referred to as the Class (80-3320/80-3358/59/60,), - - *Plaintiffs-Appellants, Cross-Appellees,*

v.

BRYANT ELECTRIC (80-3320)
CADILLAC CABLE CORPORATION, GENERL ELECTRIC, HATFIELD WIRE, LEVITON, PASS & SEYMOUR, JOHN I. PAULDING, REYNOLDS METALS, SLATER ELECTRLC, AMERICAN INSULATED WIRE, ETTCO WIRE, MARMON GROUP, RHODE ISLAND INSULATED WIRE, SQUARE D (80-3320, 80-3358)
COLUMBIA CABLE & WIRE COMPANY (80-3320/80-3359)
SOUTH WIRE COMPANY and TRIANGLE PWC (80-3320/80-3360), - - *Defendants-Appellees, Cross-Appellants.*

On Appeal from the United States District Court, Eastern District of Kentucky at Covington

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Decided and Filed July 21, 1982.

Before: EDWARDS, Chief Judge; ENGEL, Circuit Judge; and WEICK, Senior Circuit Judge*

ENGEL, Circuit Judge. On the evening of May 28, 1977, fire destroyed the Beverly Hills Supper Club in Southgate, Kentucky. One hundred sixty-five patrons and employees perished in the fire and many others were injured. Extensive litigation followed in both the State and Federal courts. Underlying this appeal is a class action commenced in the United States District Court for the Northern District of Kentucky, based on diversity of citizenship. The class consists of the legal representatives of the persons killed and approximately thirty-five individuals who claimed to have been injured in the fire. Plaintiffs named as defendants several manufacturers of "old technology" aluminum branch circuit wiring, claiming those materials had been installed in the supper club and had caused the fire.[1]

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*Judge Weick took Senior status on December 31, 1981.

[1]Plaintiffs alleged three theories of liability in their complaint: concert of action, alternative liability, and enterprise liability. The trial judge granted summary judgment in favor of defendants on the issues of alternative and enterprise liability, stating that Kentucky recognized neither theory as a basis for liability. He allowed plaintiffs to go forward on a theory of concerted action. *In Re: Beverly Hills Fire Litigation*, C. No. 77-79 (E.D. Ky. Nov. 14, 1979).

In his November 14 order, the trial judge outlined his analysis of Kentucky law of concerted action. He indicated that "[t]his doctrine imposes joint liability against '[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it.' " *Id.* at 8 (citations omitted). He determined that three elements must be satisfied in order to prevail on this theory: a causal relation between the act and injury; cooperative or concerted activities by defendants; and violation thereby of a legal standard of care. *Id.* at 8-9. He added that concerted activity can be proved in Kentucky either by explicit or tacit agreement among defendants. *Id.* at 12. This order is not at issue in this appeal.

Shortly before the trial was scheduled to begin, the trial judge ordered that it be bifurcated. The jury first would consider the question of "causation in fact." If aluminum wiring were found to be a cause of the fire, the jury would then determine questions of liability and damages.

Plaintiffs' theory at trial was that the fire began in a "dead" or empty space within the north wall of a cubbyhole next to the Zebra Room, located on the first floor of the Supper Club.[2] Plaintiffs asserted that the fire originated at an aluminum duplex receptable. The receptacle, a standard electrical outlet into which electrical appliances are plugged, was allegedly located in the cubbyhole and connected to aluminum branch circuit wiring.

Plaintiffs claimed that, due to a number of physical characteristics of old technology wiring, heat developed at the connection of the aluminum branch circuit wiring to

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[2]The Zebra Room, comprised of the Room proper, an alcove section and a cubbyhole section, is an "L-shaped" room in the front, or southeast section of the building. It is located on the first floor of the building. At approximately 18′ x 28′, the Zebra Room proper is one of the smallest rooms in the large supper club, which occupies over an acre in area. Immediately to the west of the Zebra Room proper is the alcove section, approximately 10′ x 10′. The cubbyhole section is to the west of the alcove section, approximately 7′ x 10′. It is separated from the alcove by double doors. Immediately west of the cubbyhole is the main bar. Approximate measurements were determined from a floor plan of the Beverly Hills Supper Club submitted in evidence. All directional references throughout this opinion are based on an "assumed north" indicated on the floor plan.

The Zebra Room proper, the alcove and the cubbyhole all are bordered by a common "north wall." A staircase is located on the north side of the north wall. A fountain is located directly to the north of the staircase.

the receptacle,[3] and that this heat eventually ignited the wooden studs and other building materials in the wall. Plaintiffs claimed that the heat finally caused an open flame which spread undetected within the wall for approximately

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[3]Carl Duncan, qualified as an expert in electrical fire origin, testified that there were a number of characteristics of aluminum wire, in comparison to copper wire, which made it subject to overheating. First, large size wire was used because aluminum wiring is less conductive than copper wiring; yet, the screws used to hold the aluminum wiring in place were disproportionately small. Duncan claimed this caused a lesser percentage of conducting material to be in contact with the binding screw than would have occurred with copper wire, which made it more difficult for electricity to be transferred. Duncan claimed this phenomenon itself caused overheating. Second, he found that aluminum was more easily nicked, fractured or broken during installment than was copper; he claimed that damage to the wire reduced its conductivity at various spots. Additionally, an oxide film (rust) immediately forms on exposed aluminum when exposed to the atmosphere. A similar film forms on copper, but on copper it is conductive whereas on aluminum wire it is not. He concluded this made it more difficult for electricity to flow from wire to receptacle, therefore causing a heat buildup. Finally, Duncan testified that aluminum wiring has a tendency to "creep," which decreases further the wire's ability to conduct electricity. He defined "creep" stating:

> Creep is that phenomenon of a material to flow away from pressure, and it's also referred to as cold flow. What happens is as you are torquing the screw on the material, the material itself has a tendency to flow away from pressure, and that is a physical phenomenon of the material.
>
> The net effect of that creep or cold flow is that additional surface area of the conductor is exposed to oxidation and when relaxation occurs oxide film is formed and additional heat generated because of the, again, oxidation formation on the conductor and the energy having to break that oxide film down to maintain continuity and conductivity.

Transcript at 728-29.

one to one and one-half hours before flame broke through the wall and directly engaged the Zebra Room itself.

Defendants responded that the receptacle in the cubby-hole was not proved to have been wired with aluminum branch circuit wiring. They claimed that the fire more likely began due to copper wiring of an electrical pump that was connected to a water fountain located in front of a staircase on the north side of the north wall. The defendants also suggested that the fire started as a result of numerous fire code violations found to have existed in the club.

After twenty-two days of trial over a period of eleven weeks, the jury returned a special verdict answering in the negative the question whether the connection of old technology aluminum wired to an electrical device caused the fire at the Supper Club. Based upon that finding, the trial judge entered a general judgment in favor of the defendants. Plaintiffs moved for a mistrial, for judgment notwithstanding the verdict and for a new trial. The trial judge denied all motions. These appeals followed.

While several issues are raised in these appeals, one error, improper experimentation by a juror, is of such importance that it alone mandates vacating the judgment and remanding for new trial or other proceedings. Of the numerous other issues raised, therefore, we address only those relevant to the disposition of this appeal or those whose resolution may facilitate any proceedings on remand.

I

During the trial, one of the jurors performed an improper experiment when he investigated the condition of the aluminum wiring and connections in his home. He then reported his findings to other jurors, findings which were factually at odds with plaintiff's theory of how the fire began.

Plaintiffs sought to show throughout the course of the trial that aluminum branch wiring is more likely to overheat and cause fires than is copper wiring. Carl Duncan, qualified as an expert in electrical fire origin, testified that an early indication of the degenrative process leading to overheating is that binding screws holding the wire appear to be loose. This loosening, he testified, aggravates the inability of the wire to conduct electricity. As the process allegedly occurs over a period of 5 to 10 years, plaintiffs characterize aluminum wiring systems as "time bombs."

Following this testimony, the juror examined receptacles in his home. He pulled receptacles from their boxes and checked the binding head screws for tightness. He also looked for receptacles manifesting later stages of degeneration. His experiment tended to contradict evidence presented by the plaintiffs on the hazards of aluminum wiring. The juror found nothing wrong with his own receptacles which, he claimed, had been installed eleven years earlier. The juror believed that, under plaintiffs' theory, the receptacles would have been in place long enough for some degeneration to have occurred. He also found that the screws holding aluminum wiring to his electrical devices in his outlets were tight.

After the verdict for the defendants had been rendered and the jury discharged, the juror wrote an anonymous letter to the *Kentucky Enquirer,* a newspaper of general circulation in northern Kentucky. In the letter, he explained the reasons for his decision and challenged the validity of the plaintiffs' evidence when compared to finding in his own home.[4] He also expressed the view that

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[4]The letter states:

> I want to let the people know how I reached a decision on the Beverly Hills Trial. This is the first time I have ever been called for Jury Duty . . . it was something I think everyone

(Footnote continued on following page)

the fire was caused by numerous fire code violations found in the Supper Club.

In the post-trial evidentiary hearing, the trial judge learned that the juror communicated this information to at least six other jurors during the course of the trial. At least one juror recalled having privately discussed this matter with the experimenting juror during the course of the jury deliberations. Thereafter, plaintiffs moved for a mistrial.

(Footnote continued from preceding page)

should do just to find out how the system works. It could have been shortened—it was rather repetitious, and a two hour lunch—I'm used to a half hour.

The receptacles that were taken out of the front part of the building (not in the fire) were wired with aluminum branch circuit wiring.

These were sent up state and put on a test rack. The Jury never had an opportunity to see these receptacles even though they were in the court room. New receptacles however were passed showing how aluminum could be wired—some correctly & some wrong.

In our deliberations, the receptacles that were put on test were with the many artifacts of the case. This is the first time I got to see them. (about 10 or 12 receptacles)

Two of these receptacles had the [aluminum] wire counter clockwise under the binding head screw which is wrong.

When tightening a screw clockwise the wire under the screw should be clockwise also.

Two more outlets or receptacles, the [aluminum] wire was loose under the binding head screw—I could move the wire.

In another outlet, I wanted to see if I could tighten a binding head screw that appeared to be tight. I got about 1/10" turn on the screw.

The first week of the trial the binding head screw came up about 500 times—even [the trial judge] started to get upset with the repetition.

(Footnote continued on following page)

The trial judge denied plaintiffs' motions for mistrial for judgment notwithstanding the verdict, and for a new trial based upon the juror's conduct, observing:

> In the context of the trial length, the quantity of evidence presented and the number of witnesses called by each side, this action by a juror appears to be of minor consequences and not a sufficient intrusion upon the deliberative process as to require the setting aside of the jury verdict.

(Footnote continued from preceding page)

I went home one night, pulled about 15 outlets from their boxes and wanted to see how loose the connections were.

I could not turn any of the screws one bit. My home is wired with [aluminum]. I bought the house 11 years ago in 1969. The plaintiffs talk about stress relaxation and creep which would cause the [aluminum] wire to loose its torque after a short period of time. My outlets are still tight after 11 years of use, How come these are not loose?

Another part of the trial, a list of code violations were read off as long as your arm. A witness asked if they contributed to the fire, the answer was no.

These were violations that were found in most of the unburned portions of the fire what about the violations that were destroyed by the fire no one knows about?

This is what caused the fire!! In my opinion one violation of code is too many. They should close a place down and keep it closed until the violations are corrected. When I go out on a weekend to eat or take in a show for enjoyment, I want to come home [safely].

There was a flash of fire seen in the Garden room about the same time there was smoke in the Zebra Room. Where did it start? God only knows where that fire started and how it started. Why is it that a person has to be hurt or maybe killed before a problem is corrected?

I also want to let the people who lost family & friends in the tragic fire of Beverly Hills that my prayers are with them.

one Juror on the Beverly Hills trial

In Re: Beverly Hills Fire Litigation, C. No. 77-79 at p. 8 (E.D. Ky. April 7, 1980).

Plaintiffs claim that the juror's investigation was an impermissible experiment requiring that the verdict be set aside. Defendants respond that the juror's action was harmless. They further stress that the inflammatory language regarding "time bombs" made it almost inevitable that the experiment would occur. Since the trial was expected to be a long one, the defendants claim that it is unreasonable to expect that a juror would wait until the end of the trial to inspect his own home for dangers which the plaintiffs had so characterized . Defendants contend that the juror's investigation was not in the nature of an "experiment" nor a purposeful attempt to develop information about the case being tried, but was more in the nature of a personal and unrelated experience which could not have affected the judgment of that juror or those to whom he communicated that information.

Upon a careful examination of the record and the applicable law, we regretfully conclude that the jury verdict was impermissibly tainted by what can only be characterized as an improper juror experiment.

The general rule is that a juror may not impeach his verdict. Fed. R. Evid. 606(b). *See McDonald* v. *Pless*, 238 U. S. 264 (1915); *Womble* v. *J. C Penney*, 431 F 2d 985 (6th Cir. 1970); *Gault* v. *Poor Sisters of St. Frances*, 375 F. 2d 539 (6th Cir. 1967). The rule ensures that jurors will not feel constrained in their deliberations for fear of later scrutiny by others. Further, it guarantees that jurors cannot manipulate the syte:n when their views are in the mi-

nority by repudiating an earlier verdict and obtaining a mistrial.[5] It thus advances important policy considerations.

An exception to the general rule has developed where external factors are shown to have existed. As stated by Judge Peck in *Womble, supra,* "the [general] rule does not preclude inquiry into any extraneous influences brought to bear upon the jury in order to show what the influences were and whether they were prejudicial." 431 F. 2d at 989. *See Stiles* v. *Lawrie,* 211 F. 2d 188 (6th Cir. 1954). Rule 606(b) specifically allows inquiry into external influences upon a jury.[6] This exception is necessary to assure that the parties receive a fair trial and that the integrity of the system itself is maintained. *See United*

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[5]As the Advisory Committee on the Proposed Rules of Evidence noted:

> The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harrassment. See *Grenz* v. *Werre,* 129 N.W. 2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence . . . .

[6]Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.* Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b) (emphasis added).

States v. *Ferguson*, 486 F. 2d 968 (6th Cir. 1973); *Briggs* v. *United States*, 221 F. 2d 636 (6th Cir. 1955).

Defendants contend that the juror's act in checking his own wiring was "too simple and natural to be deemed in any sense an experiment." *Stone* v. *City of Florence*, 28 S. E. 2d 409, 410 (S.C. 1943). Rather, they suggest, knowledge gleaned from that activity is in the nature of general knowledge or common experience, which a juror is entitled to consider in his deliberations. In our view, the juror experimentation here was more than a mental or emotional reaction or expression. The experiment, in fact, injected extraneous information into the trial. While the juror's conduct here may very well have been "simple and natural," it was, under any test, an experiment.

It is not uncommon for a court to instruct a jury that jurors may consider the evidence in light of their general knowledge and experiences of life, and the trial judge gave a similar instruction here.[7] One function of the jury is to infuse a practical sense into the legal theories offered at trial. Courts therefore have generally found discussions regarding such experiences quite unobjectionable. *See Stephens* v. *City of Dayton*, 474 F. 2d 997 (6th Cir. 1973); *Womble, supra*, 431 F. 2d at 989.

On the other hand, our court has not hesitated to declare mistrials where the activity went beyond mere general knowledge and was instead a response to the facts of the

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[7]The trial judge instructed the jury in part as follows:

> You are expected in deciding this case to use your judgment and common sense. Give the evidence and the testimony of the witnesses a reasonable and fair interpretation based upon your knowledge and experience of the natural tendencies of human beings, that is what you bring with you into the courtroom, your lifetime of experience, your experiences with human beings and how they react.

Transcript at 7344.

case at hand. An investigation is improper where it "amount[s] to additional evidence supplementary to that introduced during the trial." *Womble, supra,* 431 F. 2d at 989.[8] Thus, our court ordered a new trial where a juror brought into the jury room a manual published by the Highway Department, but not introduced at trial, purporting to show the length of skid marks made by automobiles at different speeds. *Stiles* v. *Lawrie,* 211 F. 2d 188 (6th Cir. 1954). Similarly, our court held that a new trial was properly granted where during the trial a juror had travelled to plaintiff's property to view certain cattle which were the subject of litigation, reporting back to the jury that he thought that the cattle looked like "about the best looking he had seen in a long time." *Aluminum Company of America* v. *Loveday,* 273 F. 2d 499 (6th Cir. 1959), *cert. denied,* 363 U. S. 802 (1960).

In the present case the juror's investigation had the effect of putting both himself and the other jurors with whom he discussed his findings in possession of evidence not offered at trial. The juror tested the outlets for tightness and compared his results to the evidence in the case, observing in his letter to the *Enquirer* that "my outlets are still tight after 11 years of use, how come these are not loose?" It is clear that additional evidence was before at least one member of the jury.

In fairness, it is apparent that the juror was troubled by references made to the dangerous propensities of aluminum wire.[9] The juror indicated his concern at the evidentiary hearing following the trial:

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[8] *See also United States* v. *Beach,* 296 F. 2d 153 (4th Cir. 1961) ("the law is well settled that a case must be decided upon evidence submitted in court during the trial and not upon private experiments of the jurors").

[9] Defendants point to four occasions when counsel for plaintiffs used the phrase "time-bomb" and two other occasions when witnesses for plaintiff lent support to that characterization.

> Q. Approximately when did that [his check of the fuse box] occur?
>
> A. Sir, the first part of the trial, it come out that they they was talking about aluminum wire wired to outlets that was like a time bomb; it could go off any time, and they brought out slides and they was showing the outlet glowing and charring and they showed the studs burning; and that's why I went home and checked them that night. I didn't check the aluminum for tests or experiments or to see if it was safe. I was concerned with my family.

Transcript of Post-trial Examination of Jurors at 39. Whatever the juror's motives, however, the potential for prejudice inherent in an out-of-court experiment in this case remains. It is impossible to determine without the benefit of a vigorous cross-examination following formal introduction of evidence whether an experiment duplicated what actually occurred in the case. Highly misleading results can follow. Here, the juror assumed his electrical outlets were constructed in the same manner as those offered by plaintiffs. He then made conclusions directly related to the outcome of the case, and he communicated these facts to other jurors. No opportunity was afforded either litigant to determine whether the juror's wiring was aluminum and, if so, whether it was "old technology" wire. They further were unable to consider other conditions that may have accounted for the differing results. In short, the juror considered evidence from an experiment which was not subject to scrutiny or cross-examination by any party.

Our circuit has recognized that such an error can rarely be viewed as harmless. The jury's receipt of such extraneous information "requires that the verdict be set aside, unless entirely devoid of any proven influence or the probability of such influence upon the jury's deliberations

or verdict." *Stiles, supra,* 211 F. 2d at 190. Here, the juror's letter made clear that the results of his investigation were a factor in his decisionmaking. While influence on a single juror may be enough to necessitate reversal and remand, *see Loveday, supra,* 273 F. 2d at 500, the error is particularly grievous because a unanimous verdict was required and the juror communicated his findings to other jurors.[10] We conclude that the controlling law permits no alternative to reversal.[11]

In remanding, the question remains whether anything can be done to avoid repetition of this incident. The trial judge instructed the jury not to seek outside information. Obviously, the juror's concern for his safety played a substantial part in the experiment which was conducted despite the instruction. While due regard ought to be given to the customary latitude which counsel need in order to bring life and meaning to the case, we suggest that the court on retrial may wish to confer with counsel on the means by which they can avoid alarming the jury. It would probably not be inappropriate under the circumstances if counsel

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[10]In *Stiles,* the court explained why a presumption of prejudice is necessary. It stated:

> The foreman of the jury was asked by the trial court whether [the extraneous evidence] played any important part in the final verdict of the jury, and his reply was: "I don't know, Judge." Neither did the district court know, nor could it have known, whether this evidence, introduced without the knowledge of court or counsel after the retirement of the jury, influenced the verdict; and, certainly, this court, farther removed from the trial, could have no way of knowing what effect this extraneous evidence produced upon the verdict.

Stiles, *supra,* 211 F. 2d at 190.

[11]Because the juror discussed his findings with other jurors, we need not decide whether an uncorroborated claim that an experiment was conducted, which potentially could be used merely as a tool to manipulate the verdict, would support a mistrial.

were cautioned in the use of inflammatory language. Perhaps the trial court itself could give more explicit precautionary instructions, provided, of course, that they themselves were balanced and did not create the very hazard they might be designed to avoid. All of this, however, we leave to the good judgment and discretion of the trial court.[12]

II

Two claimed errors concern the severance of causation from other issues in the trial.

Plaintiffs first assert that the trial judge had no authority to isolate the issue of causation. It is well settled that the ordering of separate trials is within the sound discretion of the trial judge. *Kosters* v. *Seven-Up Co.*, 595 F. 2d

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[12]Plaintiffs add that a second piece of extraneous information was improperly before the jury. Some jurors viewed a publication entitled "Reconstruction of a Tragedy," even though the trial judge refused to admit the document into evidence on the grounds it was hearsay. A copy of the publication had been admitted inadverently as part of a deposition to which it was appended. Plaintiffs assert their counsel simply failed to note the appendages to the exhibit, which is not surprising given the great quantity of evidence introduced at trial. Our examination of the document in question convinces us that the inadvertent introduction of the documents was not prejudicial as it was probably more damaging to the defendants than to the plaintiffs. The pamphlet indicated that the fire was electrical in nature and started in a concealed space in the Zebra Room. It further ruled out defendants' theory that the fire started at the water pump, and it contained several explicit pictures of the tragedy. In any event, it is highly unlikely that this circumstance will recur.

Plaintiffs also claim it was error for the trial judge to have refused to ask certain voir dire questions of potential jurors. Plaintiffs did not object at the completion of voir dire; moreover, we find the trial judge did not abuse his discretion. *See Eisenhauer* v. *Burger*, 431 F. 2d 833 (6th Cir. 1970).

347 (6th Cir. 1979); *Crummet* v. *Corbin*, 475 F. 2d 816 (6th Cir. 1973); *Moss* v. *Associated Transport*, 344 F. 2d 23 (6th Cir. 1965). Plaintiffs argue, however, that no case law supports severance of the issue of causation; rather, only severance of liability and damages has been allowed. This view-point is inconsistent with the language of Fed. R. Civ. P. 42(b), which provides in part:

> Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of *any* separate issue . . . .

(emphasis added). There is thus no reason to adopt a different standard with regard to severing causation.

As the Rule indicates, and as our circuit has recognized, the court in ordering separate trials must consider several issues such as potential prejudice to the parties, potential confusion to the jury, and the relative convenience and economy which would result.[13] *See, e.g., Koster, supra*, 595 F. 2d at 355-56. A balance of these concerns led the Eighth Circuit to approve bifurcation of the causation issue in *Beeck* v. *Aquaslide 'N' Dive Corp.*, 562 F. 2d 537 (8th Cir. 1977). The court observed:

> Evidence of plaintiffs' injuries and damages would clearly have taken up several days of trial time, and because of the severity of the injuries, may have been prejudicial to the defendant's claim [that it did not manufacture the product that injured plaintiff] . . . . Judicial economy, beneficial to all the parties, was

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[13]Plaintiffs also claim they were prejudiced by the lateness of a decision to bifurcate the proceedings. We admit some sympathy with this complaint, but we cannot say that any prejudice to the plaintiffs was not outweighed by other considerations of efficiency and convenience. In any event, it is not likely to recur.

obviously served by the trial court's grant of a separate trial.

Id. at 542.

The *Beeck* court also recognized that whether resolution of a single issue would likely be dispositive of an entire claim is highly relevant in determining the efficacy of bifurcation. The trial judge in the present case considered both the projected length of the trial and the likelihood that a resolution of the causation issue could shorten it.[14]

The conclusion of the trial judge has support in the record. The trial on causation alone took thirty-two days. Proof regarding the further issues of liability among the numerous defendants and of damages would be extensive

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[14]The trial judge described the potential advantages as follows:

> This is a class action on behalf of approximately 200 persons against 23 defendants who have been grouped together as the "Aluminum Wire and Device Group." The parties estimate that approximately 40 trial days will be required for the presentation of several hundred witnesses. Critical to plaintiffs' case is the issue of causation. Before any determination of liability upon any of these defendants can be made, it must be established that "old technology" aluminum wire either caused or contributed to the fire at the Beverly Hills Supper Club May 28, 1977. While such establishment does not in and of itself determine liability of any or all of the defendants, a negative determination would free them from such liability. There is reason to believe that a determination of this issue would materially reduce the time required to try this case. While a determination for the defendants would as a matter of law end the proceedings, it is entirely possible that an affirmative determination might enhance the likelihood of settlement.

In Re: Beverly Hills Fire Litigation, C. No. 77-79 (E.D. Ky. Dec. 12, 1979).

and expensive.[15] It therefore was reasonable for the trial judge to conclude that litigation of those issues should be avoided if they might be mooted by an adverse finding on the causation issue. The value of severance in expediting this case has already been proved. Had the juror experiment required a mistrial after the *entire* case had been tried, many more weeks of effort would have to be repeated.

A strong argument can, it is true, be made against the bifurcation of a trial limited to the issue of causation. There is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere in which causation is parted from the reality of injury. In a litigation of lesser complexity, such considerations might well have prompted the trial judge to reject such a procedure. Here, however, it is only necessary for us to observe that the occurrence of the fire itself, a major disaster in Kentucky history by all standards, was generally known to the jurors from the outset. Further, the proofs themselves, although limited, were nonetheless fully adequate to apprise the jury of the general circumstances of the tragedy and the environment in which the fire arose. As a result, we hold that the trial judge did not abuse his discretion in severing the issue of

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[15]Certainly evidence regarding whether defendants breached a legal standard of care will be extensive. Moreover, because each of several defendants could insulate itself from liability by proving it was not part of any express or tacit agreement to produce defective wiring, it is anticipated that much evidence would be submitted regarding this issue. See note 1 *supra*. A defendant further may offer evidence tending to show its wiring, because of inherent metallurgical or other differences, would perform differently from that of other companies. Additionally, the damages issue remains unresolved.

causation here. In so ruling, however, we emphasize that the decision whether to proceed in the same manner on any retrial is within the discretion of the trial judge, who will undoubtedly be benefitted from the experiences in the first trial as he makes his decision.

The plaintiffs next claim that severance, even if not in itself error, nonetheless resulted in the improper exclusion of evidence relevant to the issue of causation. Plaintiffs offered several documents as evidence supporting their contentions that aluminum wiring has a greater propensity to cause fires and that some defendants knew of this propensity. The trial judge excluded some documents in their entirety,[16] and allowed certain evidence admitted upon deletion of references to individual defendants.[17] *In Re: Beverly Hills Fire Litigation*, C. No. 77-79 (E.D. Ky. Jan. 7, 1980).

In reviewing the documents at issue, the trial judge determined that several documents, though admissions as to some defendants, were hearsay as applied to other defendants. *See* Fed. R. Evid. 802; 801(d)(2). He determined further that documents indicating knowledge of some de-

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[16]Those documents carried the Exhibit numbers:

#1182	#1928	#19,528
1291	15,310	19,542
1325	15,324	19,553
1471	15,372	19,557
15,552A	15,501	21,303
1733	15,557	25,001
1924	15,682	

[17]See specifically documents carrying exhibit numbers #1920, 1926, 19,529, 1301, 1976, 3691, and 19,610. Plaintiffs also claim that some of these documents were not permitted to be submitted to the jury during deliberations. They do not tell us which documents were not considered, nor do they indicate which were considered with portions deleted.

fendants were perhaps relevant to liability but were not relevant to causation, which alone was before the jury. *See* Fed. R. Evid. 401. Finally, he determined that those documents which were relevant to the issue of propensity of aluminum to cause fires were nonetheless inadmissible because their probative value was outweighed by the potential for prejudice if a specifically identified defendant were singled out. *See* Fed. R. Evid. 403.

Evidence is not admissible in all cases where it is relevant. Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Under this rule, admission of such evidence is placed within the sound discretion of the trial court. *United States* v. *Brady*, 595 F. 2d 359 (6th Cir. 1979).

We have reviewed the documents deemed inadmissible by the trial judge and find that he did not abuse his discretion in excluding them. To the extent that the documents did not refer only to the knowledge of the defendants but also to the propensity of aluminum to cause fires, they were relevant. They were, however, largely cumulative of plaintiffs' evidence respecting the characteristics of aluminum wire.[18] Moreover, as the trial judge observed, they may have improperly prejudiced the jury.

The trial judge on remand may decide not to isolate causation from liability. In that case, the evidence could in the trial court's discretion be offered against some de-

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[18]Three expert witnesses testified regarding the dangerous propensities of aluminum wire.

fendants with an apporpriate limiting instruction. *See* Fed. R. Evid. 105. If the case is again bifurcated, it again will be within the trial judge's discretion whether and under what circumstances to admit the documents. Although we see the dilemma caused by these exhibits as one argument working against the employment of bifurcation here, it does not constitute a basis for denying it altogether, if in the discretion of the trial judge it remains the most efficient method of managing this complex litigation on remand.

III

The plaintiffs in their appeal and the defendants in their cross-appeal each argue that their respective motions for a directed verdict should have been granted at the conclusion of the trial. Our careful review of the extensive record reveals a hotly contested issue of causation that properly was submitted to the jury. We do, however, believe that the motion of defendants is worthy of extended consideration.

Defendants claim that plaintiffs offered no proof tending to show that the duplex receptacle actually failed. They admit that evidence was offered which, if believed, tended to show that aluminum wire failed more often than did copper wire, that the fire started in the north wall of the cubbyhole, and that a duplex receptacle was mounted on that wall. Defendants assert, however, that plaintiffs' only proof that aluminum wiring actually failed is that it is statistically more likely that aluminum will fail. They add that plaintiffs offered no proof that the symptoms of aluminum wiring failure actually occurred, nor did they show that the duplex failed to function.

Defendants also claim that the jury had no method to determine that aluminum rather than copper wiring failed.

They thus liken the present case to *Rollins* v. *Avey*, 296 S. W. 2d 214 (Ky. 1956). In *Rollins*, plaintiff had a furnace installed in her living room. Thirty or forty minutes thereafter, a gas explosion occurred in the house. The plaintiff had three other gas appliances in her home, and there was no evidence that the furnace exploded or was destroyed. The Kentucky Supreme Court affirmed a directed verdict for defendants, finding that plaintiff's failure to determine which instrumentality failed was fatal to plaintiff's case. Similarly, defendants assert, plaintiffs have not pinpointed the instrumentality causing the fire here.

We are, of course, bound to apply Kentucky law to the substantive issues in this diversity case. *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1938). In determining whether plaintiffs presented enough evidence of cause in fact to avoid a directed verdict, the relevant standard in consideration of such a motion is that

> plaintiff is entitled to the most favorable inferences and construction attributable to the evidence. If such evidence is so regarded and substantially tends to support the cause of action, the verdict should not be directed against him.

Fields v. *Western Kentcky Gas Co.*, 478 S. W. 2d 20, 22 (Ky. 1972).[19]

The Kentucky view regarding when evidence of causation is sufficient to reach a jury is discussed in *Huffman* v. *SS. Mary & Elizabeth Hospital*, 475 S. W. 2d 631 (Ky. 1972):

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[19]We are bound by state law regarding the sufficiency of evidence. *Standard Alliance Ind.* v. *Black Clawson Co.*, 587 F. 2d 813, 823 (6th Cir. 1978); *Chumbler* v. *McClure*, 505 F. 2d 489, 491 (6th Cir. 1974).

> [L]egal causation may be established by circumstantial evidence. While reasonable inferences are permissible, a jury verdict must be based on something other than speculation, supposition or surmise. The type of evidence that will support a reasonable inference must indicate the *probable* as distinguished from a *possible* cause .... There must be sufficient proof to tilt the balance from possibility to probability.

Id. at 633 (citations omitted) (emphasis in original).

Where an incident could result from more than one cause, plaintiff tips the balance from possibility to probability only by ruling out other theories of causation:

> [W]here an injury may as reasonably be attributed to a cause that will excuse the defendant as to a cause that will subject it to liability, no recovery can be had.

Sutton's Adm'r. v. *Louisville & N.R. Co.*, 181 S. W. 938, 940 (Ky. 1916). That is, it must be more likely than not that the incident in question occurred as the result of the cause posited by plaintiff.

Thus, defendants invariably receive a judgment in their favor as a matter of law in Kentucky where plaintiffs are unable to isolate one cause, either by direct evidence or, more relevant to the present case, by eliminating other possible causes. For example, summary judgment for defendant was affirmed where a pool of gas exploded but it was unclear whether mechanical defects, human intervention or other causes ignited the pool. *Highway Transport Co.* v. *Daniel Baker Co.*, 398 S. W. 2d 501 (Ky. 1965). Similarly, an argument that brake failure occurred because the brakes at issue did not conform to factory specifications was rejected where other causes such as dirt in the brake lining, improper adjustment of the brake drum or improper tire pressure were not eliminated as causes. *Midwestern*

V.W. v. *Ringley*, 503 S. W. 2d 745 (Ky. 1973). In *Rollins, supra*, plaintiffs offered no evidence that excluded other gas appliances as possible causes.[20]

Conversely, the court in *Fields* v. *Western Kentucky Gas Co.*, 478 S. W. 2d 20 (Ky. 1972), found that plaintiff had presented a causation theory sufficient to go to a jury. An explosion occurred in a manhole, and plaintiff's witness testified that a seepage of natural gas was the cause. More important, he was able to state that the other proposed causes (sewer gas or a solvent used to seal pipes) were improbable ones. In reversing a directed verdict for defendant, the court stated:

> Although a jury may not be permitted to speculate when the probabilities of an event's having happened in one of two or more ways are equal and there is no evidence as to which way it did happen, it is neither legal "speculation" nor "conjecture" when a jury finds as a fact that an event happened by reason of a particular cause when the evidence on behalf of a party, if believed, is sufficient to show that it is more likely than not that the event occurred as a result of the cause so found.

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[20] *See also Huffman* v. *SS. Mary & Elizabeth Hospital*, 475 S.W. 2d 631 (Ky. 1972) (theory that plaintiff contracted serum hepatitis as a result of blood transfusion rejected where plaintiff unable to rule out other causes such as improperly sterilized needle or puncture wound occurring outside hospital); *Briner* v. *General Motors Corp.*, 461 S. W. 2d 99 (Ky. 1970) (theory that defective air conditioner caused shimmying which in turn caused steering mechanism to freeze, thereby causing an accident, rejected where plaintiff unable to rule out possibilities that plaintiff struck an object or that tire was deflated, brakes malfunctioned or tie rod broke); *American Insurance Co.* v. *Horton*, 401 S. W. 2d 758 (Ky. 1966) (causation theory that ethylene gas used to ripen bananas caused an explosion rejected where plaintiff unable to exclude sewer gas or natural gas as causes).

Id. at 22. Thus, a directed verdict for defendants would be improper where plaintiffs' evidence, if believed, could establish that other possible causes could not have precipitated the Beverly Hills fire, thereby making it more likely than not that it was caused by aluminum wiring.

The evidence here, if believed, could convince a jury that the fire began within the north wall of the Zebra Room cubbyhole.[21] It also tended to show that the fire started at a duplex receptacle located on that wall.[22] The jury could have found from the evidence that the duplex receptacle was wired with aluminum branch wiring,[23] and that alu-

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[21]Duncan testified that the fire was able to ignite and spread without anyone learning of it because the "dead space" behind the wall offered an unobstructed fire path with fixed barriers. As further support for his hypothesis, he noted that the walls collapsed inward toward the room, indicating that structural support inside the wall had given way.

[22]Duncan was able to pinpoint the origin of the fire from its "burn pattern," that is, marks indicating the path taken by the fire. He testified that the burn pattern showed the fire moved from west to east, originating approximately 48" east of the main bar room wall and 4' to 4½' off the floor. James Donnelly, an expert witness employed at Systems Engineering Associates, concurred in this assessment.

[23]William White, the electrician who wired the supper club, testified that he wired the duplex receptacle in the cubbyhole with aluminum branch circuit wiring. Duncan opined that the wiring was aluminum because such wire was found in a panel box furnishing electricity to the Zebra Room. A report of the Consumer Product Safety Commission disclosed the same information. Thomas McClorey, an expert qualified in architecture and civil engineering, testified he found aluminum wire in the panel box. Dr. Aronstein ran tests which indicated that the club was wired with old technology aluminum wire.

Dr. Aronstein reasoned that one could infer from the fact that no wire was found on certain devices that it was made of aluminum.

(Footnote continued on following page)

minum wiring failed fifty to fifty-five times more often than did copper wiring. Dr. Jesse Aronstein, a mechanical engineer, testified that other aluminum devices in the building were found in various stages of deterioration. Additionally, Eileen Druckman and Michael Sims testified regarding their perceptions of heat and odor, which could have buttressed plaintiffs' theory regarding the symptoms of electrical overheating.[24] Evidence was presented indicating that receptacles may continue to be operable while overheating, which the jury could have found was a re-

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(Footnote continued from preceding page)
Aluminum, but not copper, wire would have melted at temperatures reached in the fire. Duncan testified that aluminum wire melts at approximately 1100° F, while copper melts at approximately 1950° F; further, Duncan stated that the Beverly Hills fire reached temperatures between 1500° and 1200° F.

[24]McClorey testified that a fire in the north wall would cause a stratification of the air in the heating ducts at the top of the ceiling. He stated that this stratification would cause one of he air vents in the Zebra Room to put out cold air, the air which was at the bottom of the air duct. The second vent would put out hot air because that would have been the air which was heated in the air duct as it passed the point of the fire's origin, and that heating process would have caused the heated air to rise above the cooler air-conditioned air. Michael Sims, a guest at a wedding reception in the Zebra Room, gave testimony which could support this theory. He claimed he heard rumbling noises above and below the room, noticed that the room kept getting warmer on the side where the wedding party was located, but that the room was very cool on the other side. In fact, he stated, the room was so cool on the other side that women were putting on sweaters. Eventually, he also began to feel vibrations, and he saw the wedding cake begin to melt.

Both McClorey and Eileen Druckman testified they smelled strange odors. Druckman smelled something like candles that had been blown out; Simms smelled an odor like boiling beef or battery acid. The jury could have found those perceptions similar to plaintiffs' argument that overheating produces an acrid smell.

sponse to defendant's assertion that the wire did not fail because electrical devices continued to function.[25]

The evidence, if believed, also could have eliminated other causes for the fire such as devices in the adjoining alcove area,[26] short-circuiting,[27] negligent workmanship, the pump referred to by defendants,[28] or code violations existing in the Club. Contrary to defendant's assertions, the jury could have found that a light switch located nearby

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[25]Patty Kolbinsky, a club employee, testified that a light and adding machine, attached to the cubbyhole, continued to work. Duncan explained this was consistent with symptoms of overheating. He testified that when heat buildup occurs, the insulation material vaporizes and there is deterioration of the thermal plastic component parts of the receptacle itself. Heat from this area is obvious, he stated, and there is charring at the point where the wire connects with the receptacle. He suggested that the receptacle is still operable at this point because the circuit has not been interrupted. Dr. Aronstein agreed the circuits can work while overheating.

[26]Duncan testified that any malfunction in an alcove device would have resulted in rapid flame propagation within the room. He concluded that the fire would have been evident to others at an earlier point had it not occurred within the concealed space.

[27]A short circuit, Duncan opined, would cause a different burn pattern. He also testified that a profile of the fire showed that there had been long-term heating deterioration of the fire area. Overheating, he suggested, is sustained over a long period of time. A short-circuit is an instaneous release of energy which causes an immediate elimination of service rather than allowing a buildup of heat.

[28]Duncan testified that if the pump cord had started the fire, the burn pattern would have been different and the cord itself would have been totally consumed by the fire. He stated further that such origin could not have provided the consistent heating of materials that occurred in the area of origin.

was not the source of the fire;[29] further, they could have found that there were no other electrical devices in the cubbyhole area.[30] Evidence regarding exclusion of these causes, if believed, tended to make it more probable than not that the aluminum wiring attached to the duplex actually failed. Unlike *Rollins,* the jury could have found that the instrumentality causing the fire had been identified. A directed verdict therefore would have been improper here.

Defendants argue that plaintiffs engaged in a "compounding of inferences" in proving causation, a method not condoned in Kentucky courts as it leads to verdicts based on surmise or speculation. *See, e.g., Rollins, supra;*[31] *Briner* v. *General Motors Corp.,* 461 S. W. 2d 99 (Ky. 1970). Those cases are inapposite to our result here.

Kentucky courts generally are convinced that the plaintiff is stacking inferences where plaintiff constructs a theory with several hypotheses, none of which is supported by either direct or circumstantial evidence.[32] In the present

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[29]Duncan was asked on redirect examination about an earlier reference to the switch, and he stated that different burn patterns would have resulted from fire originating at the switch.

[30]Duncan testified that evidence of any further service in the cubbyhole was unapparent to him.

[31]The *Rollins* court was primarily concerned with whether plaintiff offered evidence sufficient to submit her case to the jury using a *res ipsa loquitur* theory as a basis for liability. Because liability is not yet at issue in the present case, that discussion in *Rollins* is not relevant here.

[32]For example, in *LeSage* v. *Pitts,* 223 S. W. 2d 347 (Ky. 1949), a loose wall fell on plaintiff. There was no direct evidence that defendant left the wall blocks in an unfixed position. The court rejected plaintiff's characterization of events, stating:

> Appellant, from the fact that mortar was attached to the block which rolled with him, infers that the block was anchored

(Footnote continued on following page)

case, each fact depended on by plaintiffs is supported by some evidence in the record for the jury to assess. Electrician William White testified that he placed aluminum wire in the receptacle. As suggested above, there was further circumstantial evidence which could have supported a finding that the fire originated there. Absent proof of the existence of the wire, the verdict may have been based on an impermissible stacking of inferences. White's direct testimony avoided this result.

(Footnote continued from preceding page)

> safely in its place in the original erection of the wall. He then theorizes, without even a scintilla of evidence to support the theory, that, in constructing the wall, appellee forgot, or at least failed, to leave openings in which to place the steel structure. This theory calls for an inference to be drawn upon the first inference. He further theorizes that, having forgotten to leave the openings in the first instance, appellee cut the openings after having erected the wall in solid formation. This is an inference drawn upon the second inference. Finally, he theorizes that, in cutting the openings in the solid wall, the block causing the injury was loosened and left in an unsafe condition in its original position. This is an inference based upon the third inference.

Id. at 352.

In *Briner, supra,* plaintiff was unable to show her car had defective brakes at the time defendant serviced the car; thus, any further proof that investigation should have occurred was an unconnected inference built on an earlier inference. When the Kentucky court speaks of "inferences," therefore, it refers not to conclusions drawn inductively from circumstantial evidence, but rather to conclusions drawn from a series of statements unsupported by any independent evidence. *Miller* v. *Watts,* 436 S. W. 2d 515, 517 (Ky. 1969) ("The kind of speculation that is not allowable occurs when the probabilities of an event's having happened in one or two or more ways are equal and there is *no evidence* as to which way it happened.") (emphasis in original); *see also Klingenfus* v. *Dunaway,* 402 S. W. 2d 844, 846 (Ky. 1966).

We obviously do not by our analysis mean to suggest that the Beverly Hills fire necessarily was caused by aluminum wiring. An extraordinary amount of circumstantial evidence was considered by the jury, which was subject to differing, yet reasonable interpretations. For example, the credibility of White, who defendants claim was induced to change his original story, was clearly at issue.

It may be that the vigorous and effective cross-examination of White induced the jury to disbelieve him. Also, defendants presented a great deal of information regarding other theories of causation, which the jury may have found more persuasive. It is not for us to pass on the credibility of White's testimony, or of that of any other witness, as defendants would seem by their arguments to urge. We merely find that, giving the evidence a construction favorable to plaintiffs, enough evidence was presented to avoid a directed verdict in favor of defendants. *See Fields, supra,* 478 S. W. 2d at 22.

IV

Plaintiffs also claim that the trial court erred in the form of special questions submitted to the jury.

The jury was provided with two alternative verdict forms, which stated:

> We, the jury, unanimously find that connection of old technology aluminum wire to an electrical device caused the fire at the Beverly Hills Supper Club on May 28, 1977.
>
> We, the jury, unanimously find that connection of old technology aluminum wire to an electrical device did not cause the fire at the Beverly Hills Supper Club on May 28, 1977.

Transcript at 7351-52. As noted earlier, the jury adopted the second statement.

Plaintiffs assert that the trial judge improperly charged the jury because he failed to define causation as a "substantial factor" in bringing about injury. Kentucky law, they assert, requires that the jury be so charged, *e.g., Deutsch* v. *Shein*, 597 S. W. 2d 141 (Ky. 1980).

Plaintiffs fail to note that the court expressly included such an instruction.[33] We do not think it was necessary for the judge once more to have incorporated the term "substantial factor" in the verdict form, having carefully instructed the jury in that regard already. It might have been preferable to have done so, and we would see no harm on remand if the trial judge should incorporate such language. The trial judge may decide to revise the form in such a way as to meet the approval of all parties. Again, the question is properly within the discretion of the trial judge.

V

No other errors asserted by the plaintiffs merit extended discussion. The court did not err in permitting the employment of external portions of a model of the north wall. It was not found to be inaccurate, and it was used for demonstrative purposes by both plaintiffs and defendants. It further was not error for the trial judge to preclude the plaintiffs on rebuttal from eliciting proof that the

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[33]The trial judge instructed the jury as follows:

> In order for the plaintiffs to prevail, they must establish by a preponderance of the evidence that the fire was caused by the connection of old technology aluminum wire to electrical devices. This is known as causation.
>
> The connection of old technology aluminum wire to electrical devices is a cause of the fire at the Beverly Hills Supper Club if it was a *substantial factor* in bringing about such fire.

Transcript at 7350 (emphasis added).

interior construction of the model did not conform to the actual construction of the wall. Because the parties learned of the inaccuracies early in trial, the judge never allowed the jury to view the interior of the model. It would not have aided the jury's consideration at all to have expanded the proofs further by developing this irrelevant information.

Neither did the trial court err in permitting cross-examination of Thomas McClory regarding numerous fire code violations found in the Beverly Hills Supper Club. McClory offered an opinion on the cause of the fire, thereby making other potential causes an appropriate subject of cross-examination. Similarly, Mr. Horton's testimony regarding fire and smoke in another room of the club was relevant to whether the fire originated in the north wall and was properly admitted.

Finally, the plaintiffs assert that defense counsel was guilty of at least six instances of improper remarks during closing arguments. We deem it unnecessary to comment on any of these. They are unlikely to recur at retrial, at least in their original form. Suffice it to say that nothing called to our attention would have warranted reversal. Much of that complained of was responsive to equally robust argument by opposing counsel.

VI

In their cross-appeal, the defendants assert that the trial court erred in denying their motion to dismiss and for partial summary judgment on the basis that the action was barred by Ky. Rev. Stat. Ann. § 413.135 (Baldwin). That statute, referred to as Kentucky's "no action" statute, was enacted in 1966 and provides in part as follows:

> (1) No action to recover damages, whether based upon contract or sounding in tort, resulting from or

> arising out of any deficiency in the design, planning, supervision, inspection or construction of any improvement to real property, or for any injury to property, either real or personal, arising out of such deficiency, or for injury to the person of for wrongful death arising out of any such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision, inspection or construction of any such improvement after the expiration of five years following the substantial completion of such improvement.

The Supper Club was substantially rebuilt in 1970 and 1971 following a previous fire in 1970. According to the evidence at the trial, no significant improvements were made to the Supper Club since that time. If controlling, section 413.135 would bar any claim resulting from allegedly defective materials installed before June 2, 1972, five years before the first complaint was filed.[34] On the other hand, if section 413.135 does not apply, the action would be timely as all claims were commenced within one year of the fire as required by the general tort statute of limitations *See* Ky. Rev. Stat. Ann. § 413.140(a)(1) (Baldwin). Because the improvements occurred in 1970 and 1971, plaintiffs' claims against these defendants are time-barred if section 413.135 is applicable, and an alternate basis for affirmance would exist.

The trial judge denied defendants' motions, finding the statute did not apply to those providing materials for construction projects. He determined that the statute should be narrowly construed because application of the statute would work a harsh result on those whose claim was barred

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[34]There were numerous complaints filed by several plaintiffs against several defendants following June 2, 1977. Because those complaints were filed later, those suits similarly would be barred.

without notice, and because the class of persons to whom the statute applies is uncertain.[35] Since the judge did not view defendants as among the class of persons either named or intended to be protected by the statute, he found it unnecessary to decide whether the statute was offensive to Ky. Const. §§ 14, 54 and 241. At least at this juncture of the proceedings, we agree with the result reached by the trial judge, but not necessarily with his reasoning.

The Kentucky courts have not considered whether "materialmen" who design products for construction projects are within the contemplation of the statute. Where state law is unclear, we must "make a considered 'educated guess' " as to how Kentucky courts would view the statute. *Ann Arbor Trust Co.* v. *North American Co.*, 527 F. 2d 526 (6th Cir. 1975).

We are not nearly so confident as the trial court that the statute ought to be narrowly construed. The statute requires that "[n]o action to recover damages . . . arising out of any deficiency in the design . . . of any improvement to real property . . . shall be brought against *any*

[35]The judge determined that the statute should be read narrowly in order to avoid the constitutional question raised in *Saylor* v. *Hall*, 497 S. W. 2d 218 (Ky. 1973). A narrow reading of the statute to exclude materialmen may raise another constitutional problem. As the judge noted, section 413.135 creates immunities. Some state courts have found that creation of statutory immunities in favor of contractors while excluding materialmen from similar protection violates state equal protection guarantees. *See Pacific Indemnity Co.* v. *Thompson-Yeager, Inc.*, 260 N. W. 2d 548 (Minn. 1977). *But see Carter* v. *Hartenstein*, 455 S. W. 2d 918 (Ark. 1970). This dilemma makes the argument for narrow construction less compelling.

person performing or furnishing the design . . . ." Ky. Rev. Stat. Ann. § 413.135(1) (Baldwin) (emphasis added).[36] Whether or not we may agree with the results, we cannot alter the language of the statute, which by its terms covers all persons furnishing such designs.

> If that language is plain and unambiguous its meaning should be upheld as so expressed, uninfluenced by any unwise or unusual result that might follow the upholding of the plainly expressed writing or statutes. . . .

Reynolds Metal Co. v. *Glass,* 195 S. W. 2d 280, 283 (Ky. 1946).

Plaintiffs urge that the statute must be interpreted in light of its purpose, which was to protect those in the building industry from unlimited liability following collapse of the rule requiring privity of contract to recover.[37] *See generally* Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action,* 18 Catholic U. L. Rev. 361 (1969). The Kentucky Court has suggested that "the intention to be gathered from employed language is one that it plainly expresses, and not the one that may have been in the mind of the composer, but which he failed to express." *Reynolds, supra,* 195 S. W. 2d at 832. *See also Kentucky Ass'n of Chiropractors, Inc.* v. *Jefferson County Medical Soc'y,* 549 S. W. 2d 817 (Ky. 1977)

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[36]As used in the statute, "person" means "an individual, corporation, partnership, business trust, unincorporated association or joint stock company . . . ." Ky. Rev. Stat. Ann. § 413.135(5) (Baldwin).

[37]Kentucky rejected the defense of privity of contract and the general rule of manufacturer non-liability as early as 1956 in *C. D. Herme, Inc.* v. *R. C. Tway Co.,* 294 S. W. 2d 534 (Ky. 1956). *See also Allen* v. *Coca-Cola Bottling Company,* 403 S. W. 2d 20 (Ky. 1966).

(intention ascertained from words employed in enacting the statute, not by surmising what was intended but not expressed). We see no evidence in the language of the statute indicating an intent to exclude materialmen from protection of the statute.

It is therefore our "educated guess" that a Kentucky Court would disagree with those cases reviewing similar stautes which held that materialmen were not covered by such statutes. *See e.g., Kittson City* v. *Wells, Denbrook & Assoc., Inc.*, 241 N. W. 2d 799 (Minn. 1976). Review of this history of similar "no action" statutes in several states and in Kentucky itself discloses no reason to exclude materialmen from the statute's coverage. The general trend to eliminate privity as a requirement of an action for breach of implied warranty or for negligence opened a broad new field of potential liability.[38] Additionally,

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[38]The Kentucky legislature evidenced further its intention to protect defendants against what it viewed as unlimited liability when it promulgated its Product Liability Act in 1978. Ky. Rev. Stat. Ann. § 411.300 *et seq.* (Baldwin). The purpose of the Act is indicated in the preamble to the Senate Bill, which provides:

> WHEREAS, in recent years there has been an increasing public awareness of a need for safer products for the consumer with a resulting increase in the size and number of product liability claims, and
>
> WHEREAS, this dramatic increase of product liability claims is causing an increase in the cost to the consumer of purchasing products, and an increase in the cost of manufacturing, wholesaling, retailing, and insuring said products, and
>
> WHEREAS, a portion of said increased costs is caused by the absence of clear legal precedents and guidelines which govern the rights and liabilities of consumers, manufacturers, wholesalers, retailers, and insurers in the litigation of product liability claims, and

(Footnote continued on following page)

courts found that a cause of action did not arise, nor did the statute of limitations commence to run, until plaintiff was injured. Engineers, contractors and architects were thus confronted with potential liability for conduct which may have occurred many years earlier, well after any opportunity to provide a reasonable defense or to have preserved any evidence had passed. *See generally* Comment, *supra,* 18 Catholic L. Rev. 361. Consequently, those groups strongly urged adoption of "no-action" statutes pertaining to improvements to reality. Because those designing parts intended to become part of the realty were affected similarly by these changes, it can safely be assumed absent exclusionary language that they are protected.[39]

(Footnote continued from preceding page)

> WHEREAS, it is in the interest of the public, consumers, manufacturers, wholesalers, retailers, and insurers, for the General Assembly to codify certain existing legal precedents and to establish certain guidelines which shall govern the rights of all participants in product liability litigation . . . .

Senate Bill No. 119 (June 17, 1978). *See also* Ky. Rev. Stat. Ann. § 413.120(14) (precluding action against "builders of a home or other improvements" more than five years after improvement).

It should be noted that we are not persuaded that section 413.300 is contradictory to section 413.135 as plaintiffs assert, their argument being that the former section is superfluous if the latter applies to materialmen. Section 413.135 applies only to constructions of real estate; it does not apply to manufacturers of personal property.

[39]Considering a similar statute, the New Jersey court stated:

> As best we can perceive, the intent of the language of the statute was to protect those who contribute to the design, planning, supervision or construction of a structural improvement to real estate and those systems, ordinarily mechanical systems, such as heating, electrical, plumbing and air conditioning, which are integrally a normal part of that kind of improve-

(Footnote continued on following page)

Assuming that Kentucky's "no action" statute was intended to extend to a class of persons including defendants, we must consider whether Kentucky would view this statute as consistent with Ky. Const. §§ 14, 54 and 241. We believe it would not.

The Kentucky Supreme Court considered the constitutional defects of section 413.135 in *Saylor* v. *Hall*, 497 S. W. 2d 218 (Ky. 1973). In *Salyor*, the court declined to apply section 413.135 to bar suit against a homebuilder for personal injuries caused by defects in construction where construction occurred before the statute was passed. The court noted that several state courts have considered similar statutes to be valid. It also observed that our court in *Lee* v. *Fister*, 413 F. 2d 1286 (6th Cir. 1969), had applied the Kentucky statute without considering the effect of several Kentucky constitutional provisions upon its validity. *Saylor, supra*, 497 S. W. at 2d at 222.

The Kentucky court then determined that the Kentucky constitution required a different analysis than that undertaken in other states. It found that the Kentucky constitu-

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(Footnote continued from preceding page)

ment, and which are required for the structure to actually function as intended.

Brown v. *Jersey Central Power & Light*, 394 A. 2d 397, 405 (N.J. 1978).

In this connection, it should be noted that whether a design is an "integral" part of a structure is not relevant to whether a certain class is protected as plaintiffs suggest; rather, it concerns whether the design is an "improvement" to realty. It would be difficult to argue that an electrical system is not an "improvement," which is defined as "a permanent and necessary part of the building." *Menne* v. *American Radiator Co.*, 150 Ky. 151, 150 S. W. 24, 25 (1912).

tion precludes the legislature from abolishing common law rights of action for injuries or death caused by negligence.[40]

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[40]The Kentucky court reasoned:

> Our state Constitution, however, has been held to prohibit the legislative branch from abolishing common-law rights of action for injuries to the person caused by negligence or for death caused by negligence. . . .
>
> Section 14 of the Constitution of Kentucky states:
>
> > "All courts shall be open and every person, for an *injury* done him in his lands, goods, *person* or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."
>
> This section was held to apply to the legislative branch of government as well as to the judicial in *Commonwealth* v. *Werner*, Ky., 280 S. W. 2d 214 (1955). Section 54 of the same Constitution states:
>
> > "The General Assembly shall have no power to limit the amount to be recovered for *injuries resulting in death* or for *injuries to person* or property." The Kentucky Constitution in Section 241 states:
> >
> > "Whenever the death of a person shall result *from an injury inflicted by negligence* or wrongful act, then, *in every such case*, damages may be recovered for such death from the corporations and persons so causing the same. . . .
>
> This court construed section 241 in 1911 to mean that ". . . it is not within the power of the legislature to deny this right of action. The section is as comprehensive as language can make it. The words 'negligence' and 'wrongful act' are sufficiently broad to embrace every degree of tort that can be committed against the person. . . ." *Britton's Adm'r* v. *Samuels*, 143 Ky. 129, 136 S. W. 143.

Saylor v. *Hall*, 497 S. W. 2d 218, 222 (Ky. 1973) (emphasis in original).

Kentucky has applied these constitutional requirements in other contexts. *See, e.g., Ludwig* v. *Johnson, et al.*, 243 Ky. 534, 49 S.W. 2d 347 (1932) (guest statute).

The court noted that a cause of action does not accrue until the time of injury. It concluded that, because section 413.130 could cut off a common law right to recovery before a cause of action even accrues, it violated Ky. Const. §§ 14, 54 and 241. The court stated:

> The statutory expressions as they relate to actions based on negligence perform an abortion on the right of action, not in the first trimester, but before conception.

Salyor, supra, 497 S. W. 2d at 224.

The court took care to write narrowly and to limit its holding to the particular facts of that case. It is thus possible to limit *Saylor* to those cases where construction occurred before the statute was promulgated. We think the more reasonable interpretation of *Saylor,* however, is that it applies to the present case, even though improvements to the club were made folowing promulgation of the statute. If the statute were applied to bar plaintiffs' claim, it would have cut off their right of suit before it accrued. We thus find the *Saylor* rationale applicable here.[41]

[41]A decision of an intermediate appellate court in Kentucky applying a medical malpractice statute of limitations without discussion of the potential constitutional infirmities outlined by the Kentucky Supreme Court (formerly the Kentucky Court of Appeals) does not convince us that the vitality of *Saylor* is in doubt, as defendants suggest. *See Ferguson* v. *Cunningham,* 556 S. W. 2d 164 (Ky. App. 1977). We note that the Kentucky Supreme Court more recently has reiterated the proposition in *Saylor* that a "cause of action does not exist until the conduct causes injury that produces loss or damage." *Louisville Trust Co.* v. *Johns-Manville Products,* 580 S. W. 2d 497 (Ky. 1979) (Reed, J.), *quoting Saylor* v. *Hall,* 497 S. W. 2d 218, 225 (Ky. 1973) (applying "discovery rule" to actions for injury from latent disease).

This case demonstrates once more the fundamental problem federal courts encounter in diversity cases. Jurisdiction conferred upon them by act of Congress forces upon the federal courts decisions of uniquely state law, which they are ill-equipped to render in any authoritative way. Thus, in the absence of any authoritative decision of the Kentucky Supreme Court on this issue, we are left with only the ability to guess what that court would do, given its limited rulings in *Saylor*. Upon the basis of that rationale, we conclude that, were it faced with the circumstances of this case, the Kentucky Supreme Court would probably rule the entire statute violative of the above cited Kentucky constitutional provisions. We therefore conclude that the trial judge's denial of the motions for partial summary judgment and for dismissal on this issue was proper, and we are unwilling to affirm judgment for defendants on this alternative basis.

To recapitulate, it is our tentative conclusion that the trial judge in this case did not err in refusing to apply the Kentucky "no action" statute. We are of the opinion that it is doubtful that the statute ought to be narrowly construed given language of the statute and the history of such legislation generally. We are nonetheless tentatively of the opinion that the Kentucky constitution precludes application of the statute to bar suit against defendants, as it would have extinguished a common law right of action before injury and before plaintiffs had any reasonable opportunity to seek redress in court. Absent any further expression on the subject by the Kentucky Supreme Court, or an authoritative decision by an intermediate appellate court, it would be our opinion that the statute should not apply. If the Kentucky courts render an authoritative decision bearing upon the question while this case is open, the district court remains free to reconsider its position both in the

light of that change and of any changes in the posture of the case on remand.

CONCLUSION

Our decision to reverse is most regretfully made, as the length of time it has taken to reach it may suggest. The trial was generally a fair one, vigorously and effectively presented by able counsel before a skillful and experienced trial judge who cannot be faulted for the events which have occasioned the reversal. We are mindful of the trial judge's observation, earlier stated in an unpublished opinion of this court, that "[e]xperience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result." *In Re: Beverly Hills Fire Litigation,* C. No. 77-79 (E.D. Ky. April 7, 1980), *quoting United States* v. *Arvant,* No. 78-5345 (6th Cir. August 27, 1979). Nonetheless, the recited facts of the improper experiment and its use in the jury deliberations are too compelling and too fraught with potential for prejudice to be ignored.

Reversed and remanded.

APPENDIX B

Nos. 80-3320
80-3358/59/60

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: BEVERLY HILLS FIRE LITIGATION

MARY ELIZABETH KISER, Individually and as Ancilliary Administratrix of the Estate of Paul S. Kiser, deceased, Individually and on behalf of all others similarly situated hereinafter referred to as the Class (80-3320/80-3358/59/60,), - - *Plaintiffs-Appellants, Cross-Appellees,*

BRYANT ELECTRIC (80-3320)

CADILLAC CABLE CORPORATION, GENERAL ELECTRIC, HATFIELD WIRE, LEVITON, PASS & SEYMOUR, JOHN I. PAULDING, REYNOLDS METALS, SLATER ELECTRIC, AMERICAN INSULATED WIRE, ETTCO WIRE, MARMON GROUP, RHODE ISLAND INSULATED WIRE, SQUARE D (80-3320/80-3358)

COLUMBIA CABLE & WIRE COMPANY (80-3320/80-3359)

SOUTH WIRE COMPANY and TRIANGLE PWC (80-3320/80-3360), - - *Defendants-Appellees, Cross-Appellants.*

ORDER—Filed December 23, 1982

Before: EDWARDS, Chief Judge; ENGEL, Circuit Judge; and WEICK, Senior Circuit Judge.*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appellees has been referred to the panel which heard the original appeal.

The petition for rehearing suggests that a recent decision of the Supreme Court of Kentucky in *Fireman's Fund Insurance Company* v. *Government Employee's Insurance Company,* 635 S. W. 2d 475 (Ky. 1982) provides a definitive answer to the question, tentatively answered in the affirmative in the original panel opinion, whether Kentucky courts would hold Kentucky's "no action" statute unconstitutional. *See* Ky. Rev. Stat. Ann. § 413.135 (Baldwin). Upon consideration the court remains of the opinion that its original conclusion has not been rendered incorrect by the recent decision cited. Justice Palmore, writing for the court in *Fireman's Fund,* determined that a statute limiting the right of a no-fault insurer to indemnity did not violate Sections 14 and 54 of the Kentucky Constitution because no such right existed at the time of the adoption of the Constitution. The court did not purport to overrule *Salyor* v. *Hall,* 497 S. W. 2d 218 (Ky. 1973), nor did it adress the applicability of section 241 of the Kentucky Constitution, which was relied upon both in *Saylor* and in other decisions of Kentucky's highest court. *See Ludwig* v. *Johnson,* 49 S. W. 2d 347 (Ky. 1932); *In Re: Beverly Hills Fire Litigation,* 80-3320, 80-3358/59/60, slip op. at 34 n. 40 (6th Cir. July 21, 1982).

Even more important, Justice Palmore reaffirmed the validity of *Saylor* in *Ball Homes, Inc.* v. *Volpert,* 633 S. W. 2d 63 (Ky. 1982), which concerned application of section 413.135 to a suit for breach of an implied warranty of fitness of a new home. He stated:

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*Judge Weick took Senior status on December 31, 1981.

> In *Salyor,* we were concerned with a negligent tort, and were of the opinion "that there was an existing right of action in this state for the type of negligence claimed in the lawsuit *when the questioned statutes were enacted.*" We held that by reason of Const. Sections 14, 541 and 241 the limitations statutes could not operate to destroy a cause of action before it came into legal existence.

Ball Homes, Inc. v. *Volpert, supra,* 633 S. W. 2d at 64 (citations omitted) (emphasis added). He then found that section 413.135 was constitutional as applied to Volpert's action because no cause of action similar to his existed when the statute was promulgated in 1966. The applicability of the cited provisions of Kentucky's constitution, particularly section 241, as a bar to application here of section 414.135, is thus made increasingly clear as the existing right of action for the type of negligence claimed dates back at least to 1956 (see n. 37, original opinion), ten years before enactment of section 413.135.

While in our opinion Kentucky cases since *Salyor* v. *Hall* have reinforced our earlier expressed view, we again suggest that the question remains open for any further decision of Kentucky's highest court which would authoritatively dictate a contrary result as a matter of state law. *See particularly In Re: Beverly Hills Fire Litigation, supra,* slip op. at 35-36.

The court finding no other issues presented by the petition which have not already been previously and adequately considered and decided,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

In Re:

BEVERLY HILLS FIRE LITIGATION

Civil No. 77-79

ORDER—Filed April 7, 1980

INTRODUCTION

This matter is before the Court on the motions of plaintiffs for a mistrial, for judgment notwithstanding the verdict, and for a new trial. In order to put this matter in its proper context, certain background observations should be made.

The lawsuits known collectively as the "Beverly Hills Fire Litigation" involve a class of some two hundred plaintiffs. Approximately one thousand defendants have been involved. The suits arose out of a fire at the Beverly Hills Supper Club in Southgate, Kentucky, an May 27, 1977. Plaintiff class consists of the personal representatives of those persons killed and those injured or the personal representatives of those injured in such fire.

In June of 1978 by Order #74 the defendants were divided for trial purposes into several categories. One of such categories was described as "Manufacturers of Aluminum Electrical Wire and/or Devices designed to be used with aluminum electrical wire and related testing services"

(hereafter Aluminum Wire defendants). At that time there were 31 defendants listed in such category.

On December 3, 1979, when trial commenced against the Aluminum Wire defendants there remained 22 defendants in the group and 19 defendants by February 20, 1980 when the matter was submitted to the jury. Prior to the presentation of testimony the Court in accordance with Rule 42(b) of the Federal Rules of Civil Procedure directed in Order #238 that "evidence on the issue of causation be separately presented to the jury for determination before any other issue is submitted."[1]

Thirty-two trial days were required for the presentation of evidence: 17 by the plaintiffs; 13 by the defendants; and 2 by the plaintiffs in rebuttal. In excess of 7300 pages of transcript were required to record the proceedings. Over 22,500 items of evidence were initially submitted for use during the trial and 281 were admitted for consideration by the jury. The items of evidence varied in size from a 10′ x 16′ mock-up of the north wall of the Zebra Room of the Beverly Hills Supper Club (Ex. 400, 529) to a ⅛th inch sliver of aluminum wire (Exhibit #5200A). By way of description, exhibits included thousands of pages of documents, electrical receptacles, connections, conduit, fixtures, salvaged artifacts, charts, drawings, diagrams, and demonstrative evidence prepared by experts to explain their respective testimony. All exhibits followed a numbering sequence whereby plaintiffs' exhibits began with odd numbers and defendants' exhibits began with even numbers. Some, but not all, of the defendants had pre-

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[1]Order #238 is dated December 12, 1979. The commencement of trial on December 3, 1979 involved only the selection of a jury. Opening statements were not made until December 10, 1979. Prior to the commencement of opening statements counsel were verbally advised of the Court's ruling on the causation issue (T. 252-254). Order #238 is attached as Appendix A.

pared separate lists of exhibits and there was an inevitable overlap therein.

During the entire trial the plaintiffs were represented by a team of five lawyers and the defendants by separate counsel whose presence in the courtroom varied from 17 to 30. So numerous were defense counsel that half of the spectator benches in the courtroom were removed in order that adequate space might be provided for their use. Early in the trial defendants adopted the procedure of seating four or five lawyers in the well of the court and the balance in the spectator section. Different defense counsel were assigned different portions of the trial and it was the counsel assigned specific responsibility for a given witness who sat in the well of the court while he testified.

An initial attempt by the Court to limit objections to "designated objectors" and bench conferences to "designated bench conferees" proved immediately unsatisfactory and the plan was dropped. Any defense attorney could object at any time and as many defense counsel as desired could attend bench conferences. Throughout the trial the plaintiffs enjoyed the advantage of a small cohesive team while the defendants frequently had the differences of opinion that would be expected among experienced and exceptionally able trial counsel.

The foregoing is intended only as a description of courtroom logistics in a highly technical, complex and prolonged trial. It is significant to a consideration of the plaintiffs' asserted errors in view of the following statement by The Honorable Albert Engle speaking for a unanimous panel of the United States Court of Appeals for the Sixth Circuit in *United States of America* v. *William L. Arvant*, No. 78-5345 (unpublished), filed August 27, 1979. Judge Engle stated "Experience teaches that while every additional day of trial increases the possibility of error, it

correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result."

Plaintiffs seek either a mistrial, judgment notwithstanding the verdict, or a new trial. For the reasons stated hereafter, each of said motions is hereby DENIED.

The substantive issues raised by plaintiffs will be dealt with in the following order:

I JUDGMENT NOTWITHSTANDING THE VERDICT

II MOTION FOR A NEW TRIAL

(A) Extraneous prejudicial information brought to the jury's attention;

(B) Bifurcation of the issue of causation from plaintiffs' causes of action;

(C) Prejudicial remarks of opposing counsel;

(D) Erroneous admission of evidence by the Court;

(E) Exclusion of evidence;

(F) Erroneous charges to the jury;

(G) Verdict contrary to the weight of the evidence;

(H) Failure to reveal identities of the defendants;

(I) Failure of the Court to conduct voir dire as requested by the plaintiffs.

III. MOTION FOR MISTRIAL.

I

JUDGMENT NOTWITHSTANDING THE VERDICT

Plaintiffs seek judgment notwithstanding the verdict despite a clear inability to satisfy the test used in this circuit. Recently the United States Court of Appeals for the Sixth Circuit in the case of *Woodruff* v. *Tomlin, Jr.*, ___ F. 2d ___, (No. 77-1216, Feb. 21, 1980) made the following observation:

> Review of a judgment n.o.v. is governed by the same rule which applies to an appeal from a directed verdict granted at the close of all the evidence. We are required 'to view the evidence as well as all inferences properly deducible therefrom in the light most favorable [to the successful party]' *Campbell* v. *Oliva*, 424 F. 2d 1244, 1245 (6th Cir. 1970). a judgment n.o.v. should not be granted 'unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict.' *Reeves* v. *Power Tools, Inc.*, 474 F. 2d 375, 380 (6th Cir. 1973).

A review of the evidence in this case does not establish "but one reasonable conclusion" as to the proper verdict. The jury reached its conclusion supported by substantial probative evidence in the record.

II

MOTION FOR A NEW TRIAL

(A) Extraneous Prejudicial Information Brought to the Jury's Attention

1. Alleged Juror Misconduct

It is asserted by the plaintiffs that a member of the jury made an investigation of and experimented upon aluminum branch circuit wiring in his own home and communicated the results of his experiment to other members of the jury. Rule 606(b) of the Federal Rules of Evidence bars an inquiry into ". . . any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon [a juror's] or any other juror's mind or emotions as influencing [a juror] to assent to or dissent from the verdict . . . or concerning [a juror's] mental processes in connection therewith. . . ." The rule

does permit testimony on the question of "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror . . ."

Both Rule 606(b) and decisions in this circuit suggest a judicial inquiry under appropriate circumstances. Neither counsel nor this Court have found decisions in this circuit on the precise issue in question. The nature of the inquiry can only be extrapolated from decisions that are not quite in point but bear upon interrogation of jurors.

In *Krause* v. *Rhodes,* 570 F. 2d 563 (6th Cir. 1977), it was held to be error for the trial court to determine ex parte and without any personal interrogation that a juror who had been threatened and assaulted could continue to serve unaffected by those incidents.

In suggesting the proper procedure the Court stated:

> The threatened juror should have been questioned by the Court to hear his version of the reported incidents and to learn whether he had discussed them with other jurors . . ." *supra* at 569.

In *United States of America* v. *Brown, et al.,* 571 F. 2d 980 (6th Cir., 1978), the Court approved in a criminal case an in-chambers conference regarding the dismissal of a juror where counsel were present and defense counsel were able to raise questions regarding such dismissal.

In *Standard Alliance Industries* v. *Black Clawson Co.,* 587 F. 2d 813 (6th Cir. 1978) the Court considered a situation involving asserted improper jury contact.[2] The Court made the following statement:

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[2]The determination of the Court may be considered as instruction to trial judges faced with the same problem in view of the following introductory statement by the Court: "Although unnecessary to our decision, an additional issue warrants mention." *Supra* at 828.

> The correct response of a trial judge when confronted with allegations of improper jury contact is to give notice to the parties and to question the jurors on the record about any alleged incident.

Supra at 828.

None of the above cases dealt with a discharged jury and the plain terms of Rule 606(b) must be construed as a limitation upon any inquiry. It has long been a principle of American Jurisprudence that jurors deliberate in secrecy and their reasons for reaching a verdict are their own.

The underlying principle regarding the nature of a judicial inquiry in matters of this sort has been suggested in *Gault* v. *Poor Sisters of St. Francis Seraph of the Perpetual Adoration, Inc.*, 375 F. 2d 539 (6th Cir. 1967).

> . . . We need not rule upon the propriety of a defeated litigant's entry into an inquisition of a jury's deliberation as was done here. We announce no general rule on the matter but express our view that *Generally jurors should not be exposed to such intrusion* (emphasis added).

Supra, at 551.

In an effort to conduct the appropriate limited inquiry and to determine the factual background of plaintiffs' assertions, questions were directed to each discharged juror by the Court on March 7, 1980. Each former juror was questioned in chambers by the Court in the presence of counsel for each side.

The facts obtained from such inquiry indicated that one juror had in the early portion of the trial examined the aluminum wiring in his own home and determined that the binding head screws were tight. It was his recollection that in a general discussion with other jurors one morning

before trial he made this fact known. Six members of the jury panel had no knowledge of his investigation or of his communication with other jurors. Five of the remaining six agreed that this had occurred within the first few days of trial and only one was of the impression that it had been mentioned to her during jury deliberation. All twelve members of the jury panel agreed that no discussion of this investigation was conducted while the jury deliberated together.

In the context of the trial length, the quantity of evidence presented and the number of witnesses called by each side, this action by a juror appears to be of minor consequences and not a sufficient intrusion upon the deliberative process as to require the setting aside of the jury verdict.

The obligation in this circuit upon a trial judge under the above circumstances appears to be a question of the "probability of . . . influence upon the jury's deliberation or verdict." *Stiles* v. *Lawrie*, 211 F. 2d 188 (6th Cir. 1954). When considered in the context of the totality of this trial this Court considers it not probable that the action of the juror or his communication to members thereof influenced the jury's deliberation or verdict.

2. Inadmissible Evidence in the Jury Room.

It is asserted by the plaintiffs that jurors were permitted to consider the contents of a publication by the National Fire Prevention Association known as "Reconstruction of a Tragedy." While under other circumstances an analysis of such publication might be necessary in order to determine whether prejudice to the plaintiffs did in fact occur, such an analysis is not necessary in view of the following factual circumstances.

It is clear that nine members of the jury panel saw the publication in the jury room. One read it, three did not,

two "leafed through it," one "looked at it vaguely," one "looked at pictures," and one "looked at it." All twelve agreed that it was not discussed by the jury during deliberation.

The factual background of this matter is as follows: Plaintiffs completed rebuttal testimony on Friday, February 15, 1980. After the jury was excused, the Court advised counsel that there would be a meeting on Monday, February 18, 1980 to consider "the exhibits to be admitted into evidence." (T. 6986). The Court also advised counsel as follows: "Mrs. Anderson [Deputy Courtroom Clerk] will have available very shortly the list of all exhibits that have been displayed to witnesses and which are therefore eligible to be admitted into evidence (T. 6986). The list of exhibits as presented to counsel are attached hereto and marked Appendix B. The Court further advised counsel that "any exhibit that has been used in this trial may be offered into evidence by either side and should the side that used it wish not to admit it and the other side wishes it to be admitted, I will hear from you because its' admissibility does not in my opinion depend upon who offers it . . ." (T. 6986 & 6987).

The list marked Appendix B was distributed to counsel by Mrs. Anderson on February 15, 1980. On the morning of February 18th a conference was held with counsel in the courtroom where all exhibits were displayed. "Reconstruction of a Tragedy" had been referred to during the trial under at least two numbers. Different copies were noted as Plaintiffs' Exhibit 13013 and as Defendants' Exhibit 400,001.

At the conference on February 18, 1980 defendants reviewed plaintiffs' exhibits on an item-by-item basis and made specific objections (T. 6992-7120). At the conclusion of defendants' objections plaintiffs were asked: "Do the plaintiffs have anything that they wish to object to offered by the defendants?" (T. 7120). Mr. Chesley responding

for the plaintiffs questioned "Reconstruction of a Tragedy" under No. 13013 only. The disposition of that exhibit was taken under advisement and during the afternoon of February 18 counsel were advised that the Court considered it inadmissible.

While Exhibit #400,001 is clearly listed on the exhibits proposed by defendants, no question was ever raised at any time regarding that exhibit. At no time has it been suggested that defendants offered this exhibit as a subterfuge and the Court does not so find. In the mass of exhibits present in this case it is clear that it was offered inadvertently. Had the matter been called to the Court's attention, the ruling on Exhibit 400,001 would have been the same as it was on 13013.

The simple fact, however, is that it was plaintiffs who failed to object and by reason of such failure it was included in the list to be considered by the jury. It hardly seems appropriate to grant a new trial to the plaintiffs in a situation created by plaintiffs' omission. See *Miller* v. *New York Cent. R. Co.*, 1239 F. 2d 10 (7th Cir. 1956).

In view of the unanimous statement of the jurors that it was not a part of their discussion and in the context of the magnitude of trial and the exhibits presented, the Court, in any event, does not consider this to be of sufficient magnitude to warrant the granting of a new trial.

B. Bifurcation On the Issue of Causation

Rule 42(b) of the Federal Rules of Civil Procedure provides in part:

> The Court, in furtherance of convenience or to avoid prejudice . . . may order a separate trial of . . . any separate issue . . .

The United States Court of Appeals for the Sixth Circuit has held:

> The decision to sever issues is left to the sound discretion of the trial court and its determination should only be reversed for an abuse of that discretion. *Parmer* v. *National Cash Register,* 503 F. 2d 275 (6th Cir. 1974).

This matter was considered in some detail with oral argument by counsel before presentation of evidence commenced (T. 213-252) and was the subject of both an oral determination from the bench (T. 252-254) and Order No. 238.

C. Prejudicial Remarks of Opposing Counsel

Plaintiffs request a new trial by virtue of certain remarks made by opposing counsel during closing argument. Specifically, plaintiffs allege that the following remarks were made by opposing counsel during final argument and were prejudicial: (1) statements concerning observations by Mrs. Horton and Dee Hall regarding the functioning of the fountain pump; (2) statements referring to certain of plaintiffs' experts who did not testify at trial; (3) statements which insinuated that plaintiffs' trial theory was of recent fabrication; and (4) statements of facts not in evidence. A review of the final argument of defense counsel does not reveal prejudice to plaintiffs, particularly in view of the Court's instructions.

In addition to the foregoing, it should be pointed out that as to the category characterized by plaintiffs as "additional mistatements of facts in evidence, and statements of facts not in evidence," there was no objection by counsel at any time. Only a timely objection preserves this issue for review on a motion for a new trial. See *Hobart* v. *O'Brien,* 243 F. 2d 735 (1st Cir. 1957), *cert. denied* 355 U. S. 830; *Griffin* v. *Ensign,* 234 F. 2d 307 (3d Cir. (1956).

With respect to statements concerning observations by Mrs. Horton and Dee Hall, the following portion of the transcript is pertinent:

> Mr. Rose: Now, if in fact the pump was off at the time Mr. Horton, his wife and Deanne [sic] report that it was off, and I believe Mr. Horton and I believe his wife because you recall they explained to you how they placed this time between 8:00 and 8:15—
>
> Mr. Chesley: Objection as to what Mrs. Horton said. She didn't testify.
>
> The Court: I don't believe Mrs. Horton testified.
>
> Mr. Rose: The testimony reflects it.
>
> The Court: I understand, but she didn't testify. The objection will be sustained.
>
> Mr. Chesley: And neither did Deanne [sic] Hall, Your Honor.
>
> The Court: Just a minute. Proceed, Mr. Rose. (T. 7300-7301)

Plaintiffs' objection as to these statements was sustained; plaintiffs did not request a curative jury instruction.

Furthermore, the statements of Mrs. Horton and Dee Hall had been introduced into evidence. The statements of Dee Hall were relied upon by one of defendants' experts, Roger Landers. As such, these statements were a proper basis for expert testimony under Federal Rule of Evidence 703 (T. 5793, 5798). The statements of Mrs. Horton were elicited during plaintiffs' examination of Mr. Horton (T. 4215, 4216). Therefore, there was a factual predicate in the record for defendants' final argument concerning statements by Mrs. Horton and Dee Hall.

As to statements referring to plaintiffs' experts who did not testify, two observations are necessary: first, this tactic was employed by both parties during final argument; and

secondly, this line of argument is not necessarily improper. See *Chesapeake & O. Ry. Co.* v. *Richardson*, 116 F. 2d 860 (6th Cir. 1941), *cert. denied*, 313 U. S. 574 (1941).

Finally, those statements which plaintiffs allege insinuated that plaintiffs' trial theory was of recent origin also are not prejudicial. Defendants' closing argument on this point stated facts in evidence and left to the jury any reasonable inference which could be drawn. One such inference is that plaintiffs did not arrive at their trial theory with respect to these defendants until October 12, 1979. As long as such inference is supportable by the facts it is not improper argument. *Chesapeake & O. Ry. Co.* v. *Richardson, supra.*

Without so finding, the Court notes that even "remarks . . . in extremely poor taste and obviously designed to prejudice the jurors" may not be so prejudicial as to require a new trial [taken] in the context of the entire record and in view of the curative instructions by the District Judge . . ." *Smith* v. *Travelers Ins. Co.*, 438 F. 2d 373, 375 (6th Cir. 1971), *cert. denied* 404 U. S. 832, 1971.

Both orally before argument commenced (T. 7157) and in specific instructions thereafter the jury was advised the statements of counsel were not evidence and were to be disregarded by the jury as such.[3]

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[3]The following appears at p. 7157 of the transcript: "We have finally reached that point, ladies and gentlemen, where counsel may now address you in what is referred to sometimes as summation, sometimes as final argument. The terms are used interchangeably, but it may be that the term final argument is a bit more descriptive because that is what this is. This is argument. All of the evidence in this case has been presented to you prior to today. Nothing that counsel may say may be considered by you as evidence." Charge 5003 contains the following: "The following are not evidence and must be entirely disregarded by you as evidence: 1. Opening statements and final arguments by counsel." (T. 7343).

D. Admission of Erroneous Evidence

Plaintiffs contend that the Court erred in admitting the following items of evidence: (1) the mock-up of the north wall of the Zebra Room (Ex. 400,529); (2) the testimony of Thomas McClory on cross-examination regarding code violations; (3) the admission of "Reconstruction of a Tragedy" (Exhibit 400,001); and (4) the testimony of Eugene Horton.

(1) Perhaps the most useful piece of evidence in the entire case was the large mock-up of the north wall of the Zebra Room of the Beverly Hills Supper Club. Its physical presence dominated the courtroom throughout the entire trial and scarcely a witness called by either side failed to utilize it in giving testimony. Plaintiffs did not object to its presence in the courtroom and raised no question regarding the accuracy of its outward appearance. Late in the trial plaintiffs learned that the interior construction of the wall was inaccurate and it is upon that inaccuracy that the objection is based. This matter was thoroughly argued by plaintiffs' counsel (T. 5693-5700) and the Court determined that the wall had never been represented to the jury as anything other than a surface replica of the Zebra Room and that the construction behind the surface was not relevant to their consideration. At no time was the jury shown the interior construction of the wall and the interior inaccuracy, if any, was not a matter of their deliberations. Plaintiffs were permitted to introduce an Exhibit No. 5307, which did demonstrate a cross-section of the wall as plaintiffs asserted it to be and argument was made on the significance of such construction (T. 7171, 7175, 7191).

It seems less than appropriate for litigants to permit without objection a large exhibit to remain in the courtroom in full view of the jury during a long trial, to use that exhibit repeatedly by their witnesses, and then to complain

that the exhibit is inaccurate in its interior, which was neither shown to nor testified about by any defense witness.

2. The interrogation of Mr. McClory regarding code violations in the Beverly Hills Supply Club was appropriate to the issue of causation. Plaintiffs conceded at the outset that their case was based upon circumstantial evidence. If a witness may testify in this regard, it would seem only fair that he be cross-examined regarding other causes of the fire which might include by way of example workmanship below safety standards and improper wiring. Mr. McClory was an expert witness for the plaintiffs and gave his opinion as to the cause of the fire. The cross-examination in question tested that opinion and left to the jury the ultimate determination of the fact issue which had been presented for their consideration.

3. "Reconstruction of a Tragedy" has been dealt with in some detail in subsection IIA of this order. While it does not bear on the failure of plaintiffs to object to the admission of Reconstruction of a Tragedy as Exhibit No. 400,001, it should be pointed out that it was plaintiffs who initially brought portions of the report to the jury's attention. Plaintiffs' counsel quoted from page 98 of the report (T. 4336 and 4330), from page 57 of the report (T. 4340), and sought to display on a screen pages 57 and 98 to the jury (T. 4344). At a bench conference, the Court pointed out that it had previously ruled portions of the exhibit were not admissible. Counsel for plaintiffs replied: "You held that was not admissible because they hadn't made it a business record. Now they have made it a business record." The Court: "O.K. Can I ask what is the status of this document? Is either side proposing to offer it into evidence?" Plaintiffs' counsel: "They have offered it, Your Honor." (T. 4346).

Plaintiffs' counsel proceeded to project on a screen portions of the document (T. 4350).

The record is clear that the copy of "Reconstruction of a Tragedy" used by plaintiffs on cross-examination was Exhibit No. 400,001 and not Exhibit 13013. Any assertion by plaintiffs that they were not aware of Exhibit 400,001 is simply not supported by the record.

4. Eugene Horton, a witness called by the defendants, testified regarding smoke and flame in the Cabaret Room (T. 4204). Since plaintiffs asserted throughout the trial that the fire commenced in the north wall of the Zebra Room and presented evidence regarding smoke and heat in that area as proof, similar evidence regarding fire origin in another area would seem to be appropriate defense. The logical conclusion of plaintiffs' position would seem to be that the testimony of a plaintiff witness regarding the location of smoke and heat is admissible, but contradictory evidence as to location by a defense witness is not.

The testimony of Mr. Horton was pertinent to the issue of causation and the conflict between his testimony and that of plaintiffs' witnesses was a matter for determination by the jury.

E. Exclusion of Evidence

Plaintiffs next object to the exclusion by the Court of certain documents and testimony. In particular, plaintiffs contest the Court's ruling with respect to the following: (1) documents submitted to the Court by plaintiffs on December 12 and 13, 1979; (2) the Krawiec deposition; and (3) Cilwa rebuttal testimony.

1. Documents submitted December 12 and 13.

On December 12 and 13 of 1979, plaintiffs submitted to the Court twenty-five (25) documents for a determination of admissibility. No foundation was laid by plaintiffs for any of these documents. The Court directed that briefs be

submitted and oral argument conducted on the question of admissibility. After a Christmas recess from December 21, 1979 to January 2, 1980, the Court ruled on the admissibility of these documents by Order 253 dated January 7, 1980 (Appendix C). In this order the Court held certain documents to be inadmissible as irrelevant to the targeted issue; portions of other documents were held to be relevant and admissible; and certain documents were held to be conditionally admissible upon the establishment of a proper foundation. No subsequent argument of plaintiffs has demonstrated any error in Order 253.

2. Krawiec's Deposition.

Plaintiffs charge that exclusion of portions of Krawiec's deposition was error. These portions were excluded as either hearsay or irrelevant to any fact of consequence. In addition, portions of this deposition were cumulative. Further discussion does not appear necessary.

3. Cilwa Rebuttal Testimony.

After a voir dire examination of Mr. Cilwa (T. 6475-6498) the Court determined to exclude his rebuttal testimony for two reasons: first, the testimony of Mr. Cilwa was not proper rebuttal testimony; secondly, his testimony was not relevant.

The scope of proper rebuttal testimony is strictly limited to that evidence which is necessary to rebut what was new in the evidence of the defense. *Sanchez* v. *Safeway Stores, Inc.*, 451 F. 2d 998 (10th Cir. 1971); *Bowman* v. *General Motors Corp.*, 427 F. Supp. 234 (E.D. Pa. 1977). Mr. Cilwa's testimony, as revealed by the voir dire examination, would not have been directed to a subject brought out during defendants' case in chief. The determination of what constitutes appropriate rebuttal is a matter within

the discretion of the Court. *Skogden* v. *Dow Chemical Co.*, 375 F. 2d 692, 705 (8th Cir. 1967).

The voir dire indicated that Mr. Cilwa would testify to the accuracy of the interior of the north wall mock-up (Exhibit 400,529). Since the interior of the exhibit was never opened to the jury, this subject was not relevant to a fact of consequence. See Federal Rules of Evidence 401 and 402.

F. Instructions to the Jury

Plaintiffs contend that the instructions to the jury were in error because (1) the Court did not charge on "substantial factor"; and (2) the word "claims" used in Charge 5002.4 should have been "claim" and the word "elements" should have been "element." Plaintiffs' first contention is inaccurate; the second is trivial.

As to the charge on causation, the Court did instruct the jury on the "substantial factor" test. Instruction 5701-K contains the following:

> The connection of old technology aluminum wire to electrical devices is a cause of the fire at the Beverly Hills Supper Club if it was a substantial factor in bringing about such fire. (T. 7350).

The assertion on "claims" and "elements" warrants little discussion. The underlying consideration of jury instructions may be found in *Laugeson* v. *Anaconda Co.*, 510 F. 2d 307 (6th Cir. 1975). At p. 315, the Court stated: "If the judge's instructions properly present the issues and the law as applicable, it is no ground for complaint that certain portions taken by themselves and isolated may appear to be ambiguous, incomplete or otherwise subject to criticism." The instruction given was neither a misstatement of the law nor prejudicial to the plaintiffs. See *South-East*

Coal Company v. *Consolidation Coal Company*, 434 F. 2d 767 (6th Cir. 1970), *cert. denied* 402 U. S. 983 (1971).

G. Verdict Was Contrary to the Clear Weight of the Evidence

This assertion of plaintiffs may be disposed of summarily. Just as plaintiffs are not entitled to a judgment notwithstanding the verdict (See Section I above), so plaintiffs are not entitled to a new trial on this issue. By general rule, the granting of a new trial is a matter purely within the discretion of the trial court. *Hopkins* v. *Coen*, 431 F. 2d 1055 (6th Cir. 1970). The verdict of the jury is supported by substantial, probative and convincing evidence. It is not the function of the Court to substitute its judgment as to the weight and sufficiency of the evidence for that of the jury. *Duncan* v. *Duncan*, 377 F. 2d 49 (6th Cir. 1967); see also Federal Rule of Civil Procedure 61.

H. Failure to Reveal to the Jury the Identities of Defendants

Plaintiffs contend that the Court erred in failing to reveal to the jury the identities of the defendants. This contention is a misstatement of what occurred at trial and a misapprehension of the reasons behind the restriction.

Correctly stated, each defendant was identified by name to the jury when counsel were introduced (T. 47-61). Additional references to named defendants were made throughout the course of the trial. See e.g. Underwriters Laboratories (T. 278, 296, 329, 333, 335, 369), Hatfield (T. 281), Kaiser (T. 297, 298, 300), General Electric (T. 298, 299, 300), Bryant Electric (T. 334), Leviton (T. 376).

The reason for the restriction on reference to particular defendants during this phase of the trial was to effectuate the determination to sever and try first the issue of causa-

tion. (Order 238). Had plaintiffs prevailed on the issue of causation the question of whether defendants acted in concert or by conspiracy in producing and promoting a defective product would have next been considered by the jury.

The restriction on references to particular defendants served the purpose of separating the issue of causation from the issue of conspiracy. Causation was a matter of proof as to inanimate wire and not as to any manufacturer thereof.

I. Voir Dire

Plaintiffs assert a right to a new trial based upon the Court's refusal to ask certain voir dire questions proposed by them. Such request for a new trial on this ground is hereby denied because (1) the scope and extent of the voir dire examination are matters in the discretion of the Court; and (2) plaintiffs failed to timely object to the voir dire examination.

The scope and extent of voir dire examination are matters addressed to the discretion of the Court. *Eisenbauer* v. *Burger*, 431 F. 2d 833, 846 (6th Cir. 1973); *Kyzniak* v. *Taylor Supply Co.*, 471 F. 2d 702 (6th Cir. 1972); 5A *Moore's Federal Practice*, ¶47.06 at 2025.

The parties to litigation are not entitled to a jury of their liking; rather, they are entitled to an impartial jury. Wright & Miller, *Federal Practice and Procedure*, ¶2482 at 467.

The Court conducted its own voir dire examination of the jurors in conformity with Federal Rule of Civil Proceduce 47. The questions to the jurors addressed a broad spectrum of areas intended to expose any basis of impartiality. The parties had been provided an opportunity, of which they took advantage, to supply the Court with

suggested questions. The Court's questions were drawn from those supplied. Included in the questions asked was a general question which inquired into any reason why those selected could not serve as fair and impartial jurors. Afterwards, the parties were heard on supplemental questions pursuant to Federal Rule of Civil Procedure 47(a). (T. 96-100 and 108). Plaintiffs offered no supplemental questions. Twenty-six prospective jurors were dismissed during the voir dire process.

Counsel were assisted in exercising preemptory challenges by two sets of questionnaires which had been filled out by the prospective jurors and which provided general informational background including education and employment.

Pursuant to 28 U.S.C. § 1870, parties were allowed 12 additional preemptory challenges per side in addition to three provided by statute for the regular jury, and 3 challenges per side for the six alternates. During this process thirty-six additional prospective jurors were dismissed.

Plaintiffs' challenge to the voir dire examination must fail because of plaintiffs' failure to object. Upon completion of the Court's voir dire examination, plaintiffs elected not to voice those additional questions which they now claim the Court failed to ask. In contrast, the defendants did offer suggested, supplemental questions which were considered by the Court (T. 96-100).

Finally, an examination of the proffered questions fails to demonstrate the Court's failure. Any unsuccessful litigant can speculate that a different jury would have reached a different result but this is not the appropriate test. See *Rogers* v. *DeVries & Co.*, 236 F. Supp. 110 (D.C. Tex. 1964). In the absence of some showing of prejudice from the voir dire examination, plaintiffs' motion for a new trial based on improper voir dire examination should be denied.

III

MISTRIAL

Plaintiffs have moved for a mistrial alleging that prejudicial extraneous information was improperly obtained by a jury member. This motion follows the entry of judgment for defendants.[4]

Plaintiffs' motion for a mistrial is DENIED for two reasons. First, judgment has already been entered in this action and the appropriate request for relief from judgment would be by motion for a new trial or judgment notwithstanding the verdict pursuant to Federal Rules of Civil Procedure 50 and 59. See e.g. *Aluminum Co. of America* v. *Loveday*, 273 F. 2d 499 (6th Cir. 1957). Plaintiffs' motions for a new trial and judgment notwithstanding the verdict have been previously considered and denied. Secondly, with respect to the specific substantive challenge raised by plaintiffs' motion for a mistrial, this challenge has also been previously addressed and denied. More specifically, it has been determined that the information which reached the jury was either not improper or not prejudicial.

CONCLUSION

A review of the assigned reasons whereby plaintiffs seek to relitigate their case leads inescapably to the conclusion that plaintiffs in fact complain over the absence of a perfect trial. This is the classical posture of unsuccessful litigants who must find some straw to clutch in their quest for a second chance. This position, however, represents a fundamental variation from the traditional posture of a trial in a court of law. A litigant is not entitled to a perfect trial. He is entitled to a fair trial. He is entitled to

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[4]Judgment for defendants was entered February 20, 1980.

full consideration of the evidence by a fair and impartial jury, properly instructed in the applicable law.

This Court is unable to determine whether plaintiffs received a perfect trial. Standards of perfection do not exist in the known concepts of American jurisprudence. Standards of fair trial, on the other hand, are discernible in our legal system and by those standards it is clear that plaintiffs did receive their full entitlement.

The motions for mistrial, for judgment notwithstanding the verdict, and for a new trial are each hereby DENIED.

It is so ORDERED.

(s) Carl B. Rubin
Chief Judge
United States District Court

APPENDIX D

TESTIMONY OF JOHN ROLAND VORIES

39

JOHN ROLAND VORIES, being first duly sworn, testified as follows:

Examination by the Court

Q. O. K., Mr. Vories, it's my understanding that at some time during the trial you checked your electrical system in your home?

A. Yes, I did.

Q. Approximately when did that occur?

A. Sir, the first part of the trial. It come out and they was talking about aluminum wire wired to outlets was like a time bomb; it could go off any time, and they brought out slides and they was showing the outlet glowing and charring and they showed the studs burning; and that's why I went home and checked them that night. I didn't check the aluminum for tests or experiments or to see if it was safe. I was concerned with my family.

Q. O. K. When was your house built? Do you know?

A. In 1969.

Q. Was it built for you or—

40

A. No. They had like seven different models up there, and you could choose from any model, and I got whatever plot of land—

Q. O. K. What I mean is, you have been the only occupant of that house?

A. Yes, sir.

Q. O. K. And when you bought it, had it been under construction or was it still to be constructed or was it finished?

A. It was, I told them what kind of brick and all that stuff, and they built it. When it was finished, they told me it was finished, and that's when I moved.

Q. Mr. Vories, what is your occupation?

A. Refrigeration mechanic for Coca-Cola.

Q. O. K. As such you do work on electrical systems?

A. Not wiring. Like tracing schematics and broken wire in a vendor or ice maker, something like that, but nothing to do with house wiring.

Q. Do you go out on the job and repair refrigeration equipment for them?

A. Yes, in the field, yes.

Q. And this deals with things like compressors?

A. Right.

Q. And other refrigeration equipment?

41

A. Right.

Q. O. K. What did you find when you checked the connections in your home?

A. I didn't find anything. I took my outlets out and I got me a flashlight and I turned my electric off, and I was looking for a receptacle that was charcoaling, like they said.

Q. Yes.

A. And then after I didn't see anything like that, I pulled the thing out and tried to tighten the screws, see if they was tight.

Q. O. K. And what did you find?

A. I found they was tight.

Q. O. K. Do I assume that you—I don't know what the technical term is. I know that the screw at the top and at the bottom holds the connections inside of the receptacle.

A. Right.

Q. You took those off and pulled this out; is that right?

A. I pulled it out a quarter of an inch so I could get a screwdriver on the screw.

Q. Right. And then you checked the binding head screw?

A. Right.

42

Q. O. K. Incidentally, please don't be nervous.

A. I am nervous.

Q. Well, you shouldn't be. I am not trying to assess blame or anything. I am not sure you have been—

A. Well, what I did, I didn't think I was doing anything—

Q. Mr. Vories, I don't think that you did anything wrong and I don't want you to be nervous. I am just trying to get some factual background, O. K.

And that was early in the trial? My recollection is that the slides were part of Mr. Aronstein's—

A. Right.

Q. —testimony?

A. Yes, uh-huh.

Q. O. K. And when you then found these things, whatever you found, did you then mention this to any of the jurors?

A. Well, I can remember when we went upstairs with a break or something—I don't know why I come up—I said, "Well, I had aluminum in my house and I had checked a couple of outlets and I found my terminals to be tight," and that's the last time—first time and last time it was ever said.

Q. O. K. Do you remember to how many jurors you mentioned this?

43

A. It's like—I really don't know. If somebody was within earshot of what I said, I guess they heard it. Except for what I said, but I didn't elaborate. I didn't tell them I was checking the outlets for the safety of my family, which I did do.

Q. Right.

A. I didn't think it had no bearing on the case whatsoever.

Q. O. K. Mr. Vories, let me tell you something. The second day of this trial I went downstairs and checked my wiring too. I didn't check with a binding head screw, but I found out that my wiring was copper.

You said that you mentioned this once. This was early in the trial?

A. Early in the trial.

Q. O. K. And it was not mentioned thereafter; is that right?

A. It was never mentioned again.

Q. And it was not a subject of any discussion that you can recall?

A. Nothing at all.

Q. All right. Mr. Vories, this is a pamphlet entitled Reconstruction of a Tragedy.

A. Uh-huh.

Q. Do you remember seeing this in the jury room?

44

A. I remember seeing it but I never got to look at it. The only thing maybe I was looking at, they was saying how pretty the fountain was. That's the only thing I seen. I looked over his shoulder and saw the fountain. I never did get to read nothing in the book.

Q. O. K. And once again, Mr. Vories, please don't be upset or nervous. It just doesn't warrant that.

Let me tell you, you are not required to talk to the press. If you want to, you may, but you don't have to.

A. I won't.

Q. They have no right to interrogate you and, above all, no lawyer may question you without my permission and I am not about to give that permission.

It's nice to see you again.

A. Yeah.

Q. I think that the jury was a good jury and, frankly, I enjoyed that case and I enjoyed my contact with you. O. K., thank you very much.

A. Uh-huh.

(Juror excused.)

* * * * * * *

APPENDIX E

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS

BRYANT ELECTRIC COMPANY

Ateliers de Constructions Electriques de Charleroi, S.A.

Bayou Cablevision Company
Bridgeport Community Antenna TV Co.

Cable TV General, Inc.
CDSW Ireland Limited
CMW Equipamentos, Ltda.
CMW Sistemas, Ltda.
Cemac Westinghouse Pty. Ltd.
China Industry Services Co., Ltd.
Compagnie des Dispositifs Semiconducteurs Westinghouse

El Paso Cablevision, Inc.
Electro-Fanal S.A.
Electrocontroles Villares, Ltda.
Eletromar Industria Eletrica Brasileira, S.A.
Eletromar Nordeste, S.A.
Ercole Marelli & Company, S.p.A.

Filmation Associates
Focus Cable of Oakland, Inc.

Galileo Argentina C.I.S.A.
Galileo Uruguya, S.A.
Grosse Point Cable, Inc.
Group W Cable of Burnsville/Egan, Inc.
Group W Cable of Lorain County, Inc.
Group W Cable of North Central Chicago, Inc.
Group W Cable of North West Chicago, Inc.
Group W Cable of St. Paul, Inc.

IEM S.A.

BRYANT ELECTRIC COMPANY (Cont.)

Industrias Electronicas
Industry Services Company of Saudi Arabia, Ltd.
Kaiser-Teleprompter of Hawaii, Inc.
Living and Learning (Cambridge) Ltd.
Mecanica Pesada, S.A.
Metzenauer & Jung GmbH
Mitsubishi Nuclear Fuel Co., Ltd.
Motores Electricos de Juarez S.A. de C.V.
Ottermill Products Limited
Piedmont Cablevision, Inc.
Saw Mill River Cablevision, Inc.
Schneider, S.A.
Southwest Video Corp. (d/b/a Group W Cable)
Teleprompter Cable Services, Inc.
Telcom Cablevision, Inc.
Teleprompter of Avon Lake, Inc.
Teleprompter of Columbia Heights/Hilltop, Inc. (d/b/a Group W Cable)
Teleprompter of Denver, Inc.
Teleprompter of Kentucky, Inc.
Teleprompter of Milwaukee, Inc.
Teleprompter of Sacramento, Inc.
Teleprompter of St. Bernard, Inc. (d/b/a Group W Cable)
Teleprompter of St. Paul, Inc.
Teleprompter of Sheffield Lake
Teleprompter of Worcester, Inc.
Transformadores de Distribucion Trade, S.A.
Transformadores TPL S.A.
Tyree Industries Limited
Tyree-Power Construction Limited
Vektron S.A.

BRYANT ELECTRIC COMPANY (Cont'd.)

Westinghouse Asia Controls Corp.
Westinghouse Canada Inc.
Westinghouse Electric-MK Limited
Westinghouse Electric Supply Company of Saudi Arabia
Westinghouse Electro Metalurgicas C.A.
Westinghouse (Jamaica) Ltd.
Westinghouse Monitor A.B.
Westinghouse Proyectos Electricos, S.A.
Westinghouse, S.A.
Wexico Systems and Services, Ltd.
Westinghouse Electric Corporation
Westinghouse Saudi Arabia Ltd.

SOUTHWIRE COMPANY

Richards Enterprises, Inc.
Suramericana de Aleacisnes
Laminadas, C.A.
Yazaki-Southwire Kabushikikaisha
National Southwire Aluminum Company

TRIANGLE PWC, INC.

Triangle Industries, Inc.
Rowe International, Inc.
Triangle Finance Company, Inc.
TPCO, Inc.
Rowe International of Canada, Ltd.
AMI
Rowe SA

REYNOLDS METALS COMPANY

Subsidiaries

Aluminio Reynolds, S.A.
Bushnell Plaza Condominium Association, Inc.
Bushnell Plaza Development Corporation
City Venture Corporation

REYNOLDS METALS COMPANY (Cont'd.)
Subsidiaries (Cont'd.)

Compania Metallurgica Colombiana, S.A. "COMECOL"

Egyptian Aluminum Products Company
Eskimo Pie Corporation
Eskimo Pie Corporation of Canada, Limited

Gas Natural Colombiano, S.A.

Industria Navarra del Aluminio, S.A.
Industrias Lacteas del Yocoimo, S.A.
Industrias Metal—Mecanicas del Quindio S.A.

Lynx—Canada Explorations Limited

Mill Pond Development Corporation
Minas do Dragao Ltda.
Mineracao Rio do Norte S.A.
Mineracao Sao Jorge Ltda.
Mineradora de Bauxita Ltda.
Minerais de Aluminio Ltd.
Mitsubishi Aruminiumu Kabushiki Kaisha
Montaje de Plantas Montaplan, S.A.

New Eastwick Corporation
Nuova Fonderpress S.p.A.

Omnia Minerios Ltda.

Phillips—C.B.A. Conductors Limited
Presidential Development Corporation
Presidential Manor Corporation
Presidential Plaza Associates
Presidential Plaza Corporation
Presidential Plaza Investors

R. I. A.—Reynolds Aluminum Italia S.p.A.
Reciclajes Envalic, C.A.
Regency Joint Venture
Regency Joint Venture II

REYNOLDS METALS COMPANY (Cont'd.)

Reycan Research Limited—Societe de Recherches Reycan Limitee
Reynolds Aluminio, Sociedad Anonima de Capital Variable
Reynolds Aluminium France
Reynolds Aluminiumwerke Gesellschaft mit beschrankter Haftung
Reynolds Aluminium Company of Canada Ltd.—Societe d'Aluminium Reynolds (Canada) Limitee
The Reynolds—Gilbane—Weybosset Joint Venture
Reynolds Regency Corporation
Reynolds Wheels S.p.A.
Reywest Development Corporation
S.L.I.M. Cisterna S.p.A.
S.L.I.M.—Societa Lavorazioni Industriali Metalli S.p.A.
Superenvases Envalic C.A.
Union Industrial y Astilleros Barranquilla "UNIAL" S.A.
Valesul Aluminio S.A.
Volta Aluminium Company Limited
Weybosset Hill Development Corporation
Worsley Alumina Pty. Ltd.

Affiliates

Alpart Farms (Jamaica), Ltd.
Alumina Partners of Jamaica
Aluminio del Caroni, S.A.
Aluminio Reynolds, Santo Domingo, S.A.
Aluminium Oxid Stade Gesellschaft mit beschrankter Haftung
Eastwick Joint Venture
Eskimo Europ, S.a.r.l.

REYNOLDS METALS COMPANY (Cont'd.)

Expert Candy Ltd.—Le Bonbon Expert Ltee.

Hamburger Aluminium—Werk Gesellschaft mit beschrankter Haftun

Jamaica Alumina Security Company, Ltd.

Jamaica Reynolds Bauxite Partners

LoMer Development Corporation

Madison Manor Associates

Manicouagan Power Company—La Compagnie Hydroelectrique Manicouagan

Puerto de Hierro, Sociedad Anonima

Reynolds Aluminium (Thailand) Company, Limited

Reynolds Philipine Corporation

Robertshaw Controls Company

UMCO, S.A.[3]

Westeel International Ltd.

Partnerships and Joint Ventures

Bennett Manor Associates

Burrstone Associates

Bushnell Plaza Apartments

Cathedral Square Associates

Cathedral Square Associates II

Chace Investors Joint Venture

Crown Oak Associates of Penfield

Curtis Apartments Associates

Cypress Courts Associates, Ltd.

Eastwick Joint Venture II

Eastwick Joint Venture III

Eastwick Joint Venture IV

Midtown Associates

Mill Pond Towers Associates

REYNOLDS METALS COMPANY (Cont'd.)

The National Housing Partnership

Oceanside Estates Associates, Ltd.

Rayburn Manor Associates

Regency West Associates

Titusville Manor Associates

Worsley Joint Venture

HATFIELD WIRE & CABLE COMPANY
Parent Company

C.C.X, Inc.

LEVITON MANUFACTURING CO.

Attcum Properties, Inc.

Deal Electric Corp.

Leviton Manufacturing of Canada, Ltd.

Wayne Realty Corp.

Electro Porcelain, Ltd.

J.E.S. Realty Co.

B.H.J. Trucking Co.

Kilvert Corp.

Thyrotek Corp.

GENERAL ELECTRIC COMPANY

Canadian G. E. Company Limited

General Electric de Mexico

Sadelmi—Cogepi Compagnin Generale
Progettazioli e Installazioni S.p.A.

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No. 82-1551

In The

Supreme Court of the United States

October Term, 1982

IN RE: BEVERLY HILLS FIRE LITIGATION

MARY ELIZABETH KISER, Individually and as Ancilliary Administratrix of the Estate of Paul S. Kiser, Deceased, Individually and on Behalf of all Others Similarly Situated as a Class,

Respondents,

vs.

BRYANT ELECTRIC COMPANY, Et Al.,

Petitioners.

On Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STANLEY M. CHESLEY
FAY E. STILZ
Waite, Schneider, Bayless & Chesley
1318 Central Trust Tower
Cincinnati, OH 45202
(513) 621-0267
Counsel of Record for Respondents

LOUIS F. GILLIGAN
Keating, Muething & Klekamp
1800 Provident Tower
Cincinnati, OH 45202
Attorney for Respondents

WILLIAM D. HILLMANN
120 E. 2nd Street
Covington, KY 41011
Attorney for Respondents

(Additional Counsel on inside cover)

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

THOMAS C. SPRAUL
Spraul & Reyering
505 Gwynne Building
Cincinnati, OH 45202

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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STATEMENT OF THE CASE

By Order dated July 21, 1982, the United States Court of Appeals for the Sixth Circuit reversed and remanded for new trial a Judgment entered February 21, 1980 in favor of defendants-petitioners as amended by Order dated April 10, 1980 of the United States District Court of Kentucky at Covington. Upon Petition for Rehearing filed by defendants-petitioners, the United States Court of Appeals for the Sixth Circuit reaffirmed its decision by Order dated December 23, 1982.

The decision of the Sixth Circuit Court of Appeals to reverse and remand was based upon prejudicial juror misconduct consisting of an "improper experiment and its use in the jury deliberations" (Petitioner's Appendix, p. 52). The facts upon which the Court relied in reaching this determination which were characterized by the Court as "too compelling and too fraught with potential for prejudice to be ignored" (Petitioner's Appendix, p. 52) are as follows.

Subsequent to a verdict being rendered in favor of defendants-petitioners in the Beverly Hills Fire Litigation, a letter was received by *The Kentucky Enquirer,* a local newspaper, wherein the writer of the letter identified himself as a member of the Beverly Hills Fire Litigation jury. The text of this letter is set forth in the opinion of the Sixth Circuit Court of Appeals at pages 16 through 18 of the Petitioner's Appendix. Within this letter, the writer discussed various aspects of the trial, commenting upon evidence produced during the trial, trial procedure and most importantly, an independent experiment conducted by the juror in his own home dealing with the subject matter of the trial. The juror, in his letter, specifically stated:

> I went home one night, pulled about 15 outlets from their boxes and wanted to see how loose the connections were.
>
> I could not turn any of the screws one bit. My home is wired with [aluminum]. I bought the house 11 years ago in 1969. The plaintiffs talk about stress relaxation and creep which would cause the [aluminum] wire to loose its torque after a short period of time. My outlets are still tight after 11 years of use. How come these are not loose? (Petitioner's Appendix, p. 18).

Upon being informed of the juror's letter, and the contents of the letter, the Trial Court agreed to conduct an examination of the jurors to determine whether or not an experiment was in fact conducted by a juror and whether any additional jurors had knowledge of such. The examination of the jurors was held on March 7, 1980, in the presence of counsel for plaintiffs and defendants. The examination was conducted by the Court, each juror being questioned individually and out of the presence of all other jurors, and a record was made of the examination.

During the examination, Juror John Vories admitted to having conducted an experiment in his home during the course of the trial. Mr. Vories stated that during the first part of the trial, he went home and checked the aluminum wired outlets in his home to determine whether his outlets were evidencing any of the symptoms which had been discussed during trial testimony. Mr. Vories' home had been built in 1969 and aluminum wiring had been installed in his home at that time. Mr. Vories further stated that he had discussed the fact that he had inspected the aluminum wired outlets in his home with other jurors (Appendix, pp. 34-39). The examination of the additional jurors indicated that Mr. Vories had in fact discussed his experiment with other jurors, both during trial and during deliberations. Juror Burton stated that Mr. Vories discussed the experiment with him during the early stages of the trial (Appendix, pp. 29-30). Juror Kremer testified that Mr. Vories spoke with her of his experiment during deliberations (Appendix, pp. 41-43). Juror Knapp recalled that Mr. Vories had discussed his experiment with her prior to deliberations, during either an early or middle phase of the trial (Appendix, pp. 43-45). Juror Ziegler

testified that Mr. Vories had discussed his experiment during trial and had commented upon it in the presence of the jurors as a whole and that possibly all 18 jurors were present at the time of the discussion (Appendix, pp. 48-49).

In reviewing the foregoing facts, the Court of Appeals determined that,

> Upon a careful examination of the record and the applicable law, we regretfully conclude that the jury verdict was impermissibly tainted by what can only be characterized as an improper juror experiment (Petitioner's Appendix, p. 19).

SUMMARY OF ARGUMENT

In summary, plaintiffs-respondents argue that defendants-petitioners' allegation that the Sixth Circuit Court of Appeals based its decision to reverse and remand solely upon the existence of an anonymous letter written by a Beverly Hills Fire Litigation juror, is erroneous. The Sixth Circuit reviewed the record as a whole, which record included the sworn testimony of jurors evidencing juror misconduct as well as said letter, which letter was merely repetitive of the sworn testimony of a juror. Plaintiffs-respondents further argue that defendants-petitioners had no fundamental right to confront and cross-examine discharged jurors during the examination of said jurors conducted by the Trial Court and that even if defendants-petitioners did have such a right, defendants-petitioners waived that right by failing to request that the Trial Court permit them to conduct cross-examination or

in the alternative by failing to object to their inability to conduct cross-examination.

ARGUMENT

Defendants-petitioners have presented for review the issue of "Whether the Court of Appeals may, consistent with principles of due process, rely upon an unidentified, unverified, anonymous letter written to a newspaper as a basis for reversing the decision of the District Court". Despite the foregoing being stated as the issue for consideration, the majority of defendants-petitioners' argument addresses a separate issue, distinct from the foregoing and not formally identified as an issue by defendants-petitioners. Further, the issue is one which was not previously raised on appeal by defendants-petitioners. This issue presents the question of whether or not the defendants-petitioners had a fundamental right to cross-examine the discharged jurors during the examination of the jurors conducted by the Trial Court in order to determine whether or not one of the jurors was the author of the letter written to the local newspaper. It is plaintiffs-respondents' position that defendants-petitioners had no right to cross-examine the discharged jurors, during their examination by the Trial Court, and that the procedure for examination of jurors implemented by the Trial Court was correct and in accordance with the procedure set forth and required by the Sixth Circuit Court of Appeals. Even if defendants-petitioners did have such a right, defendants-petitioners waived their right when they failed to

request permission to cross-examine the jurors or in the alternative when they failed to object to their inability to cross-examine. In conjunction therewith, defendants-petitioners did not request that the Trial Court ask this question of the jurors. Defendants-petitioners did submit questions to the Court for purposes of the juror examination for the Court's use in conducting the examination, but the defendants-petitioners did not include, probably purposefully, a question addressing authorship of the letter among these.

The examination of the discharged jurors was ordered by the Trial Court to take place on March 7, 1980. In its Order dated March 5, 1980, the Trial Court stated that the examination would be carried out in accordance with juror examination procedures dictated by the Sixth Circuit Court of Appeals in *Krause v. Rhodes,* 570 F. 2d 563 (6th Cir. 1977). The procedure to be followed, in *Krause v. Rhodes, supra,* is set forth in the following discussion:

> . . . It was error for the trial court to determine ex parte and without any personal interrogation that a juror who had been threatened and assaulted and told that his home would be blown up could continue to serve, unaffected by these incidents. The threatened juror should have been questioned by the court to hear his version of the reported incidents and to learn whether he had discussed them with other jurors, including the possibility that he had disclosed the way in which his assailant was attempting to cause him to vote. Unless counsel agreed to an in-camera interrogation, they were entitled to be present and a record should have been made of the proceedings. (at page 569).

In accordance with the above, the Trial Court personally examined the jurors, with counsel present and a rec-

ord was made of these proceedings (Appendix, pp. 1-67). Counsel for defendants-petitioners were present during the examination and at no time objected to the manner in which the Trial Court planned to conduct the examination nor to the Trial Court being the examiner of the jurors. Neither did counsel for defendants-petitioners request that counsel be permitted to question the jurors instead of the Court nor did counsel request that they be permitted to question the jurors subsequent to the Court's questioning. Counsel for defendants-petitioners, for reasons that now become obvious, did not request that the Court ask even one of the jurors whether or not he or she authorized the letter, either prior to the beginning of the examination, during the examination or subsequent thereto. A review of the record of the proceedings (Appendix, pp. 1-67) evidences each of the above-cited failures of defendants-petitioners. Counsel for defendants-petitioners did submit to the Trial Court a listing of questions which defendants-petitioners requested the Court to ask each juror. The question requested in defendants-petitioners' pleading entitled "Memorandum Regarding Juror Inquiry," which has been included within the Appendix, is as follows.

> In light of these cases, defendant submits that this Court should question each juror concerning what information was passed to each individual juror, whether any discussions were had, the times of such discussions, and whether any of these discussions occurred during the jury's deliberations. In addition, if there were discussions, defendant submits that this Court must question each juror as to the substance of each discussion, as only then can the alleged prejudicial effect be shown. (at p. 6).

Inasmuch as the Trial Court conducted the examination of jurors in accordance with the correct procedure

required by the Sixth Circuit Court of Appeals as set forth in *Krause v. Rhodes, supra,* and inasmuch as defendants-petitioners failed to object to such procedure, failed to request that the Court examine the jurors as to the authorship of the letter, defendants-petitioners' argument alleging a denial of due process must fail. *Brookhart v. Janis,* 384 U. S. 1 (1966) and *Re Probate Of The Will Of Lillian H. White, Deceased,* 2 N. Y. 2d 309 (1957).

In support of their arguments alleging a denial of due process, defendants-petitioners have cited to a number of cases the majority of which address the issue of the right to cross-examine adverse witnesses. In each of the cited cases, however, it was held that the right to conduct cross-examination of adverse witnesses exists in instances wherein there is a possibility that without such cross-examination liberty, property, or livelihood rights would be jeopardized. Inasmuch as defendants-petitioners were not in a situation wherein their liberty, property or livelihood rights were at issue, the cases cited by defendants-petitioners should be deemed inapplicable. The cited cases are very briefly discussed hereinafter.

Alford v. United States, 282 U. S. 687 (1931) involved a criminal prosecution for using the mails to defraud. This Court held that the defense should be permitted to conduct reasonable cross-examination of a former employee of the defendant who testified to uncorroborated conversations of the defendant, of a damaging character. *Barber v. Page,* 390 U. S. 719 (1968) was a criminal case wherein the determination of the Court was that a defendant should have the right to cross-examine a witness unless the witness was "unavailable" and that failure to cross-examine at a preliminary hearing does not consti-

tute a waiver of the right of confrontation at a subsequent trial. *Bell v. Burson*, 402 U. S. 535 (1971), cited by defendants-petitioners, stands for the proposition that before a state may deprive an individual of his license and registration, it must provide a procedure for determining the question of whether there is a reasonable possibility of a judgment being rendered against him. *Brookhart v. Janis*, 384 U. S. 1 (1965) holds that a defendant's constitutional right to plead not guilty and to have a trial where he could confront and cross-examine adversary witnesses could not be waived by his counsel without the defendant's consent. It was determined in *Carter v. Kubler*, 320 U. S. 243 (1943) that it was error for an examiner in bankruptcy to personally investigate and evaluate property outside of and independent of hearings which were conducted. In *Fuentes v. Shevin*, 407 U. S. 67 (1972), this Court held that it was a denial of due process to seize goods and chattels without a hearing. In *Goldberg v. Kelly*, 397 U. S. 254 (1969) it was held that a pre-termination evidentiary hearing is necessary to provide a welfare recipient with procedural due process and that the recipient is to have the right to cross-examine adverse witnesses at said hearing. *Greene v. McElroy*, 360 U. S. 474 (1959) held that in an administrative hearing regarding revocation of a security clearance, an opportunity to confront and cross-examine adverse witnesses is to be provided inasmuch as deprivation of livelihood is at stake. *In Re Oliver*, 333 U. S. 257 (1948) involved secret contempt proceedings and a secret sentencing. This Court held that a defendant has the right to be given reasonable notice of the charge, the right to examine witnesses against him, the right to testify in his own behalf and the right

to be represented by counsel. *Pointer v. Texas,* 380 U. S. 400 (1964) was a criminal case in which it was held that the right granted to an accused by the 6th Amendment to confront witnesses against him includes the right of cross-examination, which is a fundamental right essential to a fair trial. In *Reilly v. Pinkus,* 338 U. S. 269 (1949), the Court held that in a fraud-order proceeding, it was error not to permit the defendant to cross-examine the government's witnesses as to statements contained in medical books for the defendant was to be given a reasonable opportunity to cross-examine witnesses. *Smith v. Illinois,* 390 U. S. 129 (1968) holds that the defendant has the right to cross-examine a principal prosecution witness as to his correct name and address; the case involved the illegal sale of narcotics. *Sniadach v. Family Finance Corp.,* 395 U. S. 337 (1969) involved a prejudgment garnishment statute which did not provide for notice or hearing. This Court held that the statute violated procedural due process inasmuch as there was a taking of property involved and therefore notice and hearing were required. In *Snyder v. Massachusetts,* 291 U. S. 97 (1934), the accused was denied permission to attend a view of a premises. The Court held that the denial to attend was not a violation of due process. Finally, *Willner v. Committee on Character and Fitness,* 373 U. S. 96 (1963), held that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.

Addressing now defendants-petitioners' stated issue of whether or not the Sixth Circuit Court of Appeals erroneously relied upon a letter as a basis for reversing the decision of the Trial Court, plaintiffs-respondents argue

that the Sixth Circuit certainly did not base its decision solely upon the said letter, as has been represented by defendants-petitioners. The Court states clearly in its opinion that the Court relied upon the *entire record* before it in determining that a reversal was necessary (Petitioner's Appendix, p. 19). As has previously been discussed by plaintiffs-respondents in the foregoing Statement of the Case, the record includes the sworn testimony of jurors who verify that the experiment related in the letter did take place, that information regarding the experiment was discussed by jurors both during trial and during deliberations and that the experiment was conducted by Juror Vories. The Court of Appeals clearly did not take this sworn testimony into account in reaching its determination, as is evident from the Court's statement at page 24 of the Petitioner's Appendix, at note 11,

> Because the juror discussed his findings with other jurors, we need not decide whether an uncorroborated claim that an experiment was conducted, which potentially could be used merely as a tool to manipulate the verdict, would support a mistrial.

(See also Petitioner's Appendix, pp. 15, 16, 17, 23). Therefore, the true state of the facts is not as represented by defendants-petitioners. The testimony reviewed by the Court of Appeals more than adequately supported the Court's decision to reverse and remand and the Court's decision was very much in line with its previous decisions on the subject of juror misconduct, as set forth in *Womble v. J. C. Penney,* 431 F. 2d 985 (6th Cir. 1970), *Stiles v. Lawrie,* 211 F. 2d 188 (6th Cir. 1954) and *Aluminum Company of America v. Loveday,* 273 F. 2d 499 (6th Cir. 1959), cert. denied, 363 U. S. 802 (1960). Any argument to the contrary is lacking in substance and has no basis in fact.

CONCLUSION

Rule 17 of the Supreme Court Rules states that there must be special and important reasons presented before the Court will agree to grant review on certiorari. In the instant matter, the issue presented by defendants-petitioners is neither special nor important; the issue is actually moot.

The decision of the Court to reverse and remand cannot be challenged, for the record undisputedly contained corroborated sworn testimony admitting jury misconduct both during trial and during deliberations. In actuality, the review of defendants-petitioners issued by this Court would serve no purpose other than to delay the date upon which plaintiffs-respondents may receive the new trial to which plaintiffs-respondents are unquestionably entitled.

Plaintiffs-respondents respectfully request that defendants-petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

STANLEY M. CHESLEY
FAY E. STILZ
WAITE, SCHNEIDER, BAYLESS & CHESLEY

1318 Central Trust Tower
Cincinnati, OH 45202
(513) 621-0267

Counsel of Record for Respondents

(p. 685)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

In re:

BEVERLY HILLS FIRE LITIGATION

Before:

The Honorable Carl B. Rubin, Chief Judge,
United States District Court for the
Southern District of Ohio
(sitting by designation).

TRANSCRIPT OF PROCEEDINGS

(Chambers Conference.)

(Examination of Jurors)

Cincinnati, Ohio
March 7, 1980 — 9:00 a.m.

Robert I. Crawford, Official Court Reporter
203 Post Office Building, Cincinnati, Ohio — (513) 241-4697

(p. 686) The Court: Gentlemen, do come in and sit down, please. If your colleagues want to come in for this part of it, I will be happy to talk to them, but I want it clearly understood what I am doing and why.

Gentlemen, do come in for a moment. Do sit down. I want to explain what it is I am doing and why. My goodness, you did bring—Those that can sit down should try to. Good morning.

Mr. Cassis: This is a little more spacious.

The Court: This is indeed, which is part of the reason I wanted to do it here. Do sit down. Let me explain what it is I propose to do this morning and the reason why I feel it important to limit the number of people here.

I am simply doing this as a fact-finding procedure. I don't think I should be required to rule on a motion based upon what the newspapers have said, and at this moment my only information is what I have read in the paper.

I intend to ask each of these jurors, for my own purposes, for facts, whether or not there was a discussion about the—well, in fact, whether a juror did investigate his own aluminum wiring, whether that was part of their discussion, and then I am going to ask if they recognize this document which is Reconstruction of a Tragedy.

Now, I read the cases as well as you have. I am not going to ask them anything about their deliberations; and (p. 687) for purposes of finding out what did occur I felt that it was appropriate for me to interrogate them rather than to rely upon at best an affidavit of somebody who says that's what the juror told him.

Now, my feeling is that if I did this in an open courtroom or if I did it with this number of counsel present, it has a potentially intimidating effect. I don't want these jurors to tell me what they think I want to hear, and this is the danger of it.

Physically, I propose to have the four attorneys that will be here to sit in the back, away. They are not going to interrogate the jurors themselves. I am going to have the juror seated across from me and I will ask them ques-

tions to find out what the facts are in this matter. That's my purpose, and I think you are entitled to know.

It had not occurred to me that everybody was going to be back here from out of town, but I don't see any reason why this thing should be expanded beyond what it is.

Mr. Goodman: Your Honor?

The Court: Yes.

Mr. Goodman: What do you propose to do with the record?

The Court: That's a good question, Mr. Goodman. Originally I thought the appropriate thing to do with the record was to seal it simply because this is a discharged (p. 688) jury. I don't know that if they said to me, you know, "We are not even going to talk to you," I don't think I could force them to do it.

My feeling was I wanted whatever decision I made to be reviewable, and I thought that the appropriate thing to do was to seal this, give it to the Sixth Circuit in the event an appeal is taken and they can look at it. But I don't have any strong feelings about it. If you gentlemen would rather that this become part of the record in this case or if you want copies of it, I have no strong feelings. What is your preference?

Mr. Stein: The question which that leads to in my mind, your Honor, is, instead of an answer, it's another question. What do you envision in terms of briefing or arguments? Because it's impossible—It's difficult for those two who sit here as observers to remember well enough for briefing and argument purposes. It's impossible for those who will not have been here to participate

meainingfully (sic) in a briefing or argument process if there are to be briefs and/or arguments.

The Court: Well, let me ask you this. Supposing I limited distribution of this to counsel, that any counsel can have a copy and that I still seal the copy in the record for use of an appellate court. As I say, I have no feeling—

Mr. McCracken: I think that's reasonable because (p. 689) I don't think any of us want any reporter to get this transcript and then go cross-examine and impeach the jury again, because I think the jury has been harassed enough.

The Court: I agree with you, Mr. McCracken.

Mr. McCracken: There may be inconsistent statements and, if there are, I don't think they should be subjected to any more criticism.

The Court: Well, frankly, the basis of my order that day that they were not to be interrogated was for that precise reason. I don't believe a juror should be required to justify his decision, and I had hoped to avoid harassment. The fact is the law is contrary and I do not have a right I recognize now to prevent the newspapers from contacting these people. I do propose to tell the jurors that they are not obligated to talk to any person, and I do intend to impose the Southern District of Ohio rule that lawyers may not because, I agree with you, I do not intend these jurors be harassed.

O. K. If that's agreeable, I will do it that way.

Mr. Gilligan: Your Honor, one question with regard to the memorandas that we will be writing about this.

The Court: Yes.

Mr. Gilligan: Should we hold that in camera also and just exchange it between counsel for the plaintiffs (p. 690) and the aluminum?

Mr. McCracken: I think that would be—

Mr. Gilligan: When we file it, file it just with your Honor so that your Honor can hold the original in camera.

Mr. Chesley: And then not file it with the attorneys. Naturally we will be referring to the transcript and you will be back into the same transcript.

The Court: I will give you gentlemen any odds anybody cares to book that the gentlemen are going to get somehow a copy of this but, you know, I can only take the steps that I think are appropriate.

Mr. McCracken: I think we should make the effort not to.

The Court: O. K. I would like not to. I really don't want to see this case on the front page of the paper. It's over and done with and I think this is not to be encouraged.

Mr. Measle: Is there some way you can impose some sort of a gag rule on us as attorneys?

The Court: Let me put it this way, to the attorneys I am going to damn well try. I think I have some disciplinary rights that I would impose on lawyers. I think it is wrong for lawyers to interrogate jurors. I don't think that they should be subjected to your advocacy.

Mr. Chesley: Your Honor, I don't believe anybody (p. 691) is even making a hint that any lawyer has contacted any jurors.

The Court: I know that, but I want to retain it.

Mr. Measle: Your Honor, what you are going to put in the record you are going to distribute just to the attorneys, I understand?

The Court: That's right.

Mr. Measle: Is there any way that we can keep it that way? Do you have any remedy for it, if I might ask that?

The Court: Well, let me put it this way. I will take a dim view of any lawyer who deliberately gives this to the press.

Mr. Measle: That's what I wanted to know.

The Court: And if it may be that three years from now it suddenly dawns on them he has never won another case in my room, you know that would be just coincidence. (Laughter.)

O. K., but so far as going beyond that point, I am saying to you gentlemen I don't think you should do it. I think it's wrong. I don't believe that this is a matter for public entertainment. I am perfectly content to rule on your motion; whichever way I rule somebody is going to take an appeal. I think they ought to know, the appellate court ought to have available to them factual information (p. 692) rather than newspaper accounts or affidavits that somebody presented. That's really—

Mr. Johnson: Your Honor, the factual information that you are seeking to elicit by calling the jurors back—and I have gotten all this through copies of newspaper articles myself—is whether or not a juror tested or looked at—

The Court: Yes.

Mr. Johnson: —aluminum receptacles in his home.

The Court: There are two problems, Mr. Johnson, that I understand from the newspapers. Number 1, it is said that a juror went to his home and unscrewed I think 16 receptacles, tested the connections, the binding head screw connections with aluminum wire and found they were all tight and allegedly came back and reported that to the jury. O. K.

The second thing is that a juror indicated that he spent some of the time in the jury deliberations reading this document Reconstruction of a Tragedy and, while it isn't critical to our discussion, I would like to know whether that is a fact.

And my examination of the record, gentlemen, indicates a very simple situation. The plaintiffs simply neglected to object when this was offered.

Mr. Chesley: Your Honor, we would take issue—

(p. 693) The Court: Well, Mr. Chesley, I am not going to debate—

Mr. Chesley: I understand, but we would take issue for the record, your Honor. We have a problem with the record. Right now the record is blank as to whether or not any copy of Reconstruction of a Tragedy was admissible or not admissible.

The Court: No, Mr. Chesley, that isn't the state of the record. The state of the record is that there were two or more separate offerings of this document under two different numbers. The list of all numbers was given to

you in advance of our meeting on Monday. You picked up the number 13,000 and something and raised an objection. You did not pick up the other number. It was there on the list given to you, and the plaintiffs simply were silent.

Mr. Chesley: Your Honor, that was not my point.

The Court: Well, that's my point and that's why I am saying this parenthetically, that so far as I am concerned there was—

Mr. Chesley: But as we looked at the record today, even 13,000 and whatever—13, is that the number?

The Court: I think it is 13,013.

Mr. Chesley: It is not even noted in the record as being excluded because this was not excluded.

The Court: It doesn't matter. It was excluded (p. 694) orally and counsel were so advised.

Mr. Chesley: But, your Honor, for purposes of the record, and I don't want to debate it with the Court—

The Court: All right.

Mr. Chesley: For purposes of the record, I would like to have it indicated that the ruling of the Court was as to 13,013, or that copy 13,000—

The Court: That's right.

Mr. Chesley: —that it was to be excluded from going to the jury.

The Court: No question about it, Mr. Chesley. There were three documents, and the record reflects that they were given to me on Monday at the end of our conference and I think they are identified by number. There was

this; there was something called the Burndy Report and there was a third one—

Mr. Chesley: General Electric Communication.

The Court: O. K. And as counsel you were called Monday afternoon that these, whatever the disposition was —At least two of them, as I recall, were not held admissible. But the fact is that at the meeting on Monday, after counsel had a list by number of all exhibits, included in that list was the other document Reconstruction of a Tragedy, by number; and when the plaintiffs were asked, "Do you have any objection to this list?" there was no response.

(p. 695) Mr. Chesley: Your Honor, I don't want to debate—

The Court: All right.

Mr. Chesley: —but there is one point that I do want to clear up for the record. We were not notified until 9:00 a.m. of Wednesday morning as to the Court's ruling relative to Reconstruction of a Tragedy, if it's 13,003, and the other two documents. That's when we were notified. I made a phone call to the clerk on Wednesday morning.

The Court: It can't be Wednesday morning.

Mr. Chesley: Yes, your Honor, the day they started deliberation.

The Court: Well, if this has to be done by affidavit, it will, but I think you were notified Monday afternoon.

Mr. Chesley: No, your Honor, we were not.

The Court: All right. The fact is that document was not admitted into evidence and the jury didn't see it, pe-

riod. They didn't see it. They saw the same document under a different number which you didn't object to.

All right. Gentlemen, I am not going to try the issue at this point. I am simply saying in response to your question, Mr. Johnson, I would like to know whether or not this was a subject of discussion. Now, those are the two points that have been brought to my attention.

(p. 696) Mr. Stein: Your Honor, may I inquire when you question the juror who supposedly checked the receptacles in his house—

The Court: Right.

Mr. Stein: —may we know at this point what questions you intend to ask him? Will it be limited simply to—

The Court: O. K., probably just that question, Mr. Stein, "Did you check the receptacles in your home?" and if the answer is yes, "Did you advise other jurors of the results?" That's all.

Mr. Chesley: Your Honor, we would like to go one step further as to when this occurred.

The Court: I think that may be of some importance. I may ask him whether he did it before deliberations or during deliberations.

Mr. Chesley: And when he advised the jurors.

Mr. Johnson: My concern about going into that is anyone who had aluminum wiring at home and listened to Jesse Aronstein and didn't check them would probably be thinking he is sitting on a time bomb. I just don't see the significance.

The Court: Mr. Johnson, I don't know that there is any significance to this. It's my feeling as long as all of our information is from the newspapers—Please forgive (p. 697) me. I don't want to rely upon newspapers. I just want to know what the facts are.

Mr. Johnson: I agree with the Court.

Mr. Spraul: Your Honor, one point on the record for Mr. Johnson's benefit.

The Court: Right.

Mr. Spraul: There have been affidavits filed.

The Court: O. K.

Mr. Spraul: So I believe it's more than just a newspaper record.

The Court: All right. I might also indicate parenthetically on the second day of this case I went down and checked the wiring in my house (laughter) and found it to be copper.

O. K., gentlemen, if there is nothing further, I would like to get started.

Mr. Chesley: Your Honor, I have one other thing further—

The Court: Yes.

Mr. Chesley: —and I just want to put it on the record.

The Court: All right.

Mr. Chesley: I am a little concerned in view of the Sixth Circuit decision in Standard Reliance as to the ex-

clusion of even the defense counsel unless they waive their (p. 698) rights on a question of could it be construed as any kind of ex parte. Since these are defendants, our position on behalf of the plaintiffs is that our preference would be that the defense counsel that want to be here be present. That's just for the record.

The Court: Mr. Chesley, this is hardly similar to Standard Reliance. That was something that occured while a case was in progress and I had an opportunity to interrogate the jurors then. This is a discharged jury and, as I say again, I am not even sure I have authority to bring them in. I have some real doubts about that; and I don't believe that anybody has a right, a legal right, to be present. I think if I wanted to I could call them in, interrogate them myself, put it on the record and there it is for the appellate court. I am not going to allow counsel to participate in questioning, and you have raised your point and you are here as observers.

Mr. Chesley: Your Honor, one last thing for the record so that there will be no debate on this question—

The Court: Right.

Mr. Chesley: —of the Reconstruction of a Tragedy. We would like to cite into the record pages 7,120 through pages 7,124 in which the only thing we discussed with your Honor was the Reconstruction of a Tragedy as opposed to the number. It is true that the Court at page 7,124 (p. 699) discussed the number, 13,013.

The Court: Mr. Chesley, it's obvious my position on that, and we have had portions of the record examined and it is quite clear that the document that was seen by the jury was called to everyone's attention by number. It

seems to me on Friday, at the very latest on Monday morning, Mrs. Anderson gave both sides a list of all exhibits and that number was included and no one objected to it.

Mr. Chesley: Your Honor, for the record, could we have the number of the other Reconstruction of a Tragedy?

The Court: I don't have it handy. Mr. Pecht, are you in the courtroom?

Mr. Pecht: Yes.

The Court: Do you know? It's a 400,000 number.

Mr. Pecht: Do you have that memo?

The Court: Let me think a second.

Mr. Chesley: I would just like to have it for the record.

The Court: You may.

Mr. Cassis: I think it was 400,001.

Mr. Chesley: It's a 400,000 number.

The Court: It is a 400,000 number.

Mr. McCracken: Mr. Pecht, wasn't there also a copy attached to Best's deposition?

Mr. Chesley: It was the Best Deposition Exhibit (p. 700) Number 3, which was then converted into a court number, probably a 400,000 number.

The Court: Gentlemen, I have done what I frequently do; I put it in a safe place and now I can't remember what the safe place is.

Mrs. Anderson says 400,001, and I will take her word for it.

Mr. Chesley: O. K., your Honor. Are we able to determine at this time, for the record only, as to whether or not there was any other number for Reconstruction of a Tragedy other than 13,013 and 400,001 that would have been on Mrs. Anderson's list?

The Court: I don't know at the moment. I can't respond to that.

Mr. McCracken: Is this the list you are looking for (indicating)?

The Court: No, not really. I am looking for the portions of the record that I had Xeroxed that bear upon this, although may I see it for just a moment?

Mr. McCracken: That's the telephone conversation (handing).

The Court: Yeah. In my disposition of this I will attach the documents or the list of documents that was submitted to all counsel prior to the meeting on Monday, on that Monday.

(p. 701) All right, gentlemen, I would like to get started.

Mr. Brown: Your Honor, I have two questions—

The Court: All right.

Mr. Brown: —if I may.

The Court: Sure.

Mr. Brown: This is new to me and I am sure all of us. Do you intend to give an oath to these people?

The Court: No.

Mr. Brown: All right. Second question, are you going to ask them, assuming arguendo that a discussion did take place about the checking of the aluminum wire, do you intend to ask the jurors whether it had any effect upon their verdict?

The Court: Oh, my goodness, no.

Mr. Brown: I am not saying what effect.

The Court: Mr. Brown, I think that that is improper for me to do. No, I am not interested in what affected their deliberations. I don't think I can ask that.

Mr. Brown: I am not sure. That's why I wanted to know what you were going to do.

Mr. Chesley: Your Honor, we would request on behalf of the plaintiffs that the witnesses—pardon me—that the jurors be sworn.

The Court: Well, I hadn't given that too much (p. 702) thought.

Mr. McCracken: Aren't they still under the juror's oath?

The Court: They are discharged.

Mr. Chesley: Discharged. That's why we would think that they should be sworn.

The Court: I don't see any particular problem with it.

Mr. Brown: If you do, do it as a group.

The Court: I don't want to bring them down as a group, Mr. Brown. I would like to do it separately.

Mr. Brown: Oh, I see.

The Court: I will swear them in.

Mr. Chesley: Thank you, your Honor.

The Court: I have no problem.

Mr. Gilligan: Your Honor, with regard to the questions, when we filed our motions with regard to the interrogation of the jury, on page 9 of our memorandum we had listed out some questions. I don't believe the defendants have filed anything objecting to that, and I don't know if your Honor has had an opportunity to look at them.

The Court: I have.

Mr. Gilligan: We did not ask any questions which would go to the mental impressions of the jurors, and so in accordance with 606(B) of the Federal Rules of (p. 703) Evidence, may I ask your Honor if it's possible if we might be able to by agreement—

The Court: No.

Mr. Gilligan: —suggest that those questions be asked?

The Court: No. I am not going to be bound by what either side agrees for me to ask. This is for my information. I have got a motion before me and I am going to dispose of it; and just as I would do my independent research on the law, I am doing independent research in the facts, and you are here as observers.

I point out again that it would seem to me perfectly appropriate if I did this without anybody present. This is not a procedure that is set forth anywhere in any statute or any rule that I have ever seen. I just want some facts.

Mr. Chesley: Your Honor, we would ask that juror Vories be asked whether he did this inspection by himself and, if not, who he did it with.

The Court: Well, Mr. Chesley, I am simply going to take this one step at a time. You have filed the questions that you wish me to ask. The record will show what I do. If I am in error I have the utmost confidence that somebody will take it to the Court of Appeals.

Mr. McCracken: I would also like for the record (p. 704) to reflect that the fact that the defendants did not respond to their questions doesn't mean that we assent to their questions.

The Court: I don't believe it's required.

Mr. Stein: Judge, while we are all here together on a related but not exactly this subject—

The Court: Yes.

Mr. Stein: —would you tell us—We have not filed anything in response to their pleadings—

The Court: All right.

Mr. Stein: —not pleadings; their memorandum and motions—

The Court: Right.

Mr. Stein: —and so forth and, as I discussed with Mr. Pecht, while—He just didn't know what you had in mind of terms of a briefing schedule; and it didn't seem to make any sense to respond to part of it when perhaps the major part involved this investigation.

The Court: Well, Mr. Stein, first of all, you are aware I extended time for them to file their memorandum.

Mr. Stein: So they haven't even filed that.

Mr. Chesley: That's correct.

The Court: Yes. It seems to me that your time to respond doesn't begin until they have filed their memorandum. I would ask that you do it with deliberate speed. (p. 705) I don't think it serves anybody's purpose for this thing to remain in limbo. After you have filed your memorandum I may give them a very few days to respond and then I want to rule promptly; and frankly, gentlemen, I would like to rule on this by the end of the month if that is possible. Now, this is the 7th. When is your memorandum due?

Mr. Chesley: The 12th, your Honor.

The Court: All right. Ten days beyond that would be the 22d.

Mr. Stein: 22d.

The Court: Does that seem like enough time?

Mr. Brown: Probably reasonable. I think we have done our research.

Mr. McCracken: We have done our research.

The Court: All right. O. K., and I would simply like, whichever way I rule, I would like to do it by the end of the month and, you know, get this phase of the case behind me.

Anything further, gentlemen? By the way, it's a pleasure to see all of you (laughter), and let's proceed with the jury.

Mr. Stein: Are those who are not going to stay going to be meeting any special place? Where are we going to get together?

Mr. McCracken: I think we will go back over to (p. 706) 1036.

A Voice: To El Greco's.

Mr. Johnson: An anticipatory victory party (laughter).

Mr. Cassis: We will be at Covington Chili.

The Court: Let me give you the procedure. They will come down here one by one. When they are finished they will then go across to the witness room next to the courtroom. They will not have an opportunity to talk to each other until after each has been down.

Mr. McCracken: Thank you.

The Court: Thank you, gentlemen. Those of you who will be staying, may I ask you to put your chairs back against the wall?

Mr. Gilligan: Your Honor, the procedure, so we are not interrupting you at all, in the event after your Honor finishes asking them questions—

The Court: Yes.

Mr. Gilligan: —will there be any opportunity for us to perhaps suggest additional questions to your Honor? I don't want to speak up—

The Court: Yes. I don't want you to speak up. I would like you to come over here and in effect have a bench conference.

Mr. Gilligan: Afterwards.

(p. 707) The Court: Yes. Let's see, we will want a fourth chair back there.

And, gentlemen, could I impose on you that while they are here you not smoke? O. K. In years to come you will thank me.

Gerry, I think I will ask you to assist. Let's bring them down. You might ask them who was juror number 1 and let's have that juror first.

Mr. Pecht: O. K.

The Court: And then when they are finished you will take them over to the witness room. By the way, is the press out there?

Mr. Pecht: (Nodding.)

The Court: Predictable.

Mr. Brown: They were.

The Court: Well, predictable.

Mr. Pecht: Judge, this is Mrs. Pagan.

The Court: Good morning. How are you?

Mrs. Pagan: Fine. Thank you. How are you?

The Court: We are going to end up the way we started—

Mrs. Pagan: We sure are.

The Court: —asking you questions. I just want to ask you a few questions and, since it's going to be on the record, I want it to be under oath.

(p. 708) Mrs. Pagan: Okay.

The Court: Mr. Crawford, would you administer the oath?

EDITH MARY PAGAN, being first duly sworn, testified as follows:

Examination

By the Court:

Q. And let's have your name for the record.

A. Edith Mary Pagan.

Q. O.K. Mrs. Pagan, I read in the newspapers that one of the jurors checked the switches, the receptacles in his home and that he told other jurors the results. Do you have a recollection of anyone telling you that fact?

A. Nobody told me about it.

Q. O.K. Was this subject ever brought up in your presence?

A. Not that—I never heard anybody talk about it.

Q. O.K. You did not?

A. No, sir.

Q. Neither during the time the evidence was coming in the case nor during the time of the deliberations?

A. No, sir.

Q. Let me ask you one other question. This is a book called Reconstruction of a Tragedy. Do you recall seeing (page 709) that in the jury room?

A. Yes, I do.

Q. O.K. And did you read it?

A. No, I did not.

Q. O. K. Do you recall anybody making any comments about what was inside of it?

A. No, I do not recall any comments. I did see people looking through it.

Q. O. K. Do I understand that it was not the subject of deliberation?

A. It was not the subject of deliberation; no, sir.

Q. O. K. Thank you very much, Mrs. Pagan.

A. Uh-huh.

Q. It's nice seeing you again.

A. You too.

Q. One last thing. You are not obligated to talk to any newspaperman. If you want to you may, but you are not obligated to and if they are harassing you you are not required to answer their questions.

A. Thank you.

Q. O. K. Thank you, Mrs. Pagan.

(Juror excused.)

Mr. Chesley: Before the next juror comes in, may we pose an objection? There was a question to (p. 710) this juror whether or not anything having to do with their deliberations resulted from the Reconstruction of a Tragedy.

The Court: That was not the question. I just asked was this a subject of deliberations.

Mr. Chesley: I am sorry, Your Honor that's correct. That was what your question was. We would just for the

record object to that question because it goes to mental impressions—

The Court: All right.

Mr. Chesley: —606(A).

The Court: I don't think so. I think the improper question would be, "Did this affect the deliberations?" but I have no problem with it.

Mr. Pecht: Judge, this is Mr. White.

The Court: Good morning, Mr. White.

Mr. White: Hi. How are you?

The Court: Do sit down.

Mr. White: Thank you.

The Court: Mr. White, from what I have read in the newspaper there are a couple of questions I want to ask you.

Mr. White: Sure.

The Court: And since we are doing it on the record, I would like to do it under oath. Mr. (p. 711) Crawford, would you please administer the oath to this witness?

JOSEPH J. WHITE, JR., being first duly sworn, testified as follows:

Examination

By the Court:

Q. Mr. White, I have read in the newspapers that one of the jurors had made some tests upon his own wire

receptacles in his home. Were you aware that that had occurred?

A. No, sir; not at all.

Q. Did anyone ever discuss that with you?

A. No, sir; not with me.

Q. O. K.

A. In fact, I told the newscasters that contacted me, I said, "This is absolutely news to me." And I said, "I think you are going to be blowing something out of proportion even if it was said."

I told him possibly that it could have happened, but it would have had to have happened out of my presence and that would have been kind of unlikely.

Q. O. K. To the best of your recollection, nobody discussed this with you?

A. No, sir.

Q. All right. Mr. White, this is a pamphlet (p. 712) entitled Reconstruction of a Tragedy.

A. Yes, sir.

Q. Do you recall seeing it in the jury room?

A. Not for me to know it, no, I did not. But I do remember Mr. Ziegler and another lady looking at a book, but I did not know what the book was. I never looked at any of the books, so at the time I absolutely did not know what it was. Since then I found out that they was looking at that, but I didn't know that.

Q. At the time of deliberations?

A. No, sir. In fact, this did not enter into our deliberations. The aluminum thing that the fellow was supposed to have checked, there was never a mention of this in our deliberations. The jury was absolutely—had based their opinion on what was said in the courtroom, and that was all as far as my—

The Court: All right. Mr. White, thank you very much.

A. Is this still being recorded?

Q. Yes.

A. All I was going to tell you was that I appreciated what you did do for us.

Q. Mr. White, it was a pleasure, really. You were good partners. I enjoyed it.

A. Well, I will tell you, I really, truly think (p. 713) that you had a fine group of jurors and I think you got a fair decision to this.

Q. No one can ask for more. It's nice to see you again, Mr. White.

A. It's nice to see you.

Q. Thank you.

(Juror excused.)

Mr. Brown: Your Honor, you did not tell him he didn't have to talk to the press.

The Court: You are right, and I should have.

Mr. Brown: I almost said something, but I thought I better shut up.

The Court: By the way, was he the foreman?

Mr. Chesley: Number 12. Akins.

The Court: My impression of this guy was that he was a good juror.

Mr. Brown: Isn't he the guy that had a part-time business or a business on his own?

The Court: Yes, and one day he asked that we adjourn a half hour early because he had an important appointment.

Mr. Pecht: Judge, this is Mrs. Gulley.

The Court: Good morning. Do sit down. Nice to see you again, Mrs. Gulley.

Mrs. Gulley: Thank you.

(p. 714) Mr. Stein: Could we have the witness' name?

The Court: Gulley, G-u-l-l-e-y, Jean Frances Gulley.

Mrs. Gulley, I read some things in the newspaper and I thought I better check it out, and I want to ask you just a few questions.

Mrs. Gulley: O. K.

The Court: And I would like, since this is on the record, that it be under oath, and I am going to ask Mr. Crawford to administer an oath to you, please.

JEAN FRANCES GULLEY, being first duly sworn, testified as follows:

Examination

By The Court:

Q. Mrs. Gulley, I have heard it said that one of the jurors went to his home and checked the wire connections in the receptacles. Were you aware of that?

A. No, I was not.

Q. Did anyone talk to you, any other juror, about that test that he made?

A. No.

Q. Was it ever discussed in your presence?

A. No.

Q. O. K. This is a pamphlet entitled (p. 715) Reconstruction of a Tragedy. Do you remember seeing this in the jury room?

A. Yes, I do.

Q. Did you look at it?

A. It was lying across the table from where I was sitting. Someone else had been reading it. I got up and walked around the table and leafed through it and read a paragraph here and there. I do not even remember what I read.

Q. O. K. Was it discussed with other jurors?

A. Not to my knowledge.

Q. O. K. All right. That's all I wanted to know, Mrs. Gulley. Let me point out to you, you are not required to talk to the press if you don't want to.

A. All right.

Q. They have no right to force you to talk to them. If you want to, you may, but if you don't want to be both-

ered with them, you don't have to talk to them.

A. O.K.

Q. And you are specifically not required to talk to any lawyer or anyone representing a lawyer.

I thank you for coming down. It's nice seeing you again.

A. You are welcome.

(Juror excused.)

(p. 716) Mr. Gilligan: Your Honor, can I ask a question?

The Court: Yes.

Mr. Gilligan: In the event that one or more of the jurors would indicate that they did have some discussions during the course of the trial, could I ask that the Court inquire as to what those discussions were, that maybe there were some discussions in addition to the testing, perhaps about the evidence during the course of the trial?

The Court: I have some real hesitation, Mr. Gilligan, in going into that. I don't want to know what conclusions they came to. I think that's improper.

Mr. Gilligan: I didn't mean conclusions, but I meant perhaps discussions.

The Court: How are you, sir?

Mr. Burton: All right.

The Court: Do sit down.

Mr. Pecht: Mr. Vories.

Mr. Burton: Burton.

Mr. Pecht: Burton. I am sorry.

The Court: You are Mr. Burton, right. Mr. Burton, from what I read in the newspaper I thought I ought to talk to each of the jurors, and (p. 717) I have just a few questions to ask you. Since it's on the record, I would like to do it under oath.

Mr. Burton: All right, sir.

The Court: Mr. Crawford, would you administer the oath to this witness, please?

WILLIAM L. BURTON, SR., being first duly sworn, testified as follows:

Examination

By The Court:

Q. Mr. Burton, I read in the paper that one of the jurors had made some tests of his electrical connections in his home. Did anyone ever discuss that with you?

A. He mentioned it up there, but he didn't discuss it. What he did, he just said, hearing all this stuff about the possibilities of electrical wiring loose and all, he took the plates off and he checked the screws to be sure they were tight.

Q. When did this happen, before you were deliberating or during deliberations?

A. It was sometime during the trial. No, it wasn't while we was deliberating.

Q. O. K. This was sometime—

A. I don't recall just when. It was sometime during the trial. I think it was shortly, sometime around (p. 718)

when they were talking about how dangerous the screws were, coming loose and all this and so forth.

Q. That would have been fairly early in the trial, wouldn't it?

A. Probably would have. I just can't recall when it was.

Q. Were there a group of you that he talked to or was it just you? Do you recall?

A. I don't recall.

Q. O. K. And if I understand what you are saying, you specifically do not recall this happening during deliberations?

A. No, sir.

Q. O. K. Let me ask you something else, Mr. Burton. This is a pamphlet entitled Reconstruction of a Tragedy.

A. I saw that.

Q. You saw that?

A. I didn't read it.

Q. You did not?

A. I saw it.

Q. Was it in the jury room while you were deliberating?

A. Yes, it was in the jury room.

Q. O. K. Was it the subject of any discussion (p. 719) among jurors that you recall?

A. No, it wasn't.

Q. Mr. Burton, thank you.

Mr. Chesley: Your Honor, may we approach the bench?

The Court: All right. Let me come over there. I will talk to you.

(Bench conference off the record.)

Q. Mr Burton, when the other juror mentioned that he had made these tests, did he tell you what he found?

A. He just said he didn't find no loose screws, is all.

Q. O. K. All right.

Mr. Chesley: One last thing, your Honor, It's my—

The Court: That's all the further I am going, Mr. Chesley.

Mr. Chesley: I wanted to—

The Court: That's all the further I am going.

Q. Mr. Burton, you are not under any duty to talk to the press.

A. All right.

Q. If you want to, you may, but they have no right to interrogate you if you do not want to be bothered.

A. No, and I won't talk to them either because (p. 720) they blow everything out of proportion.

Q. Well, they are trying to sell newspapers. Mr. Burton, thank you very much, and it's real nice seeing you.

A. All right. Thank you.

Mr. Pecht: Here you go, Mr. Burton.

(Juror excused.)

Mr. Chesley: Your Honor, our concern was that this man did not identify who the juror was that told him.

The Court: I don't think it matters, really.

Mr. Chesley: Your Honor, may we also request, because I don't know if we are getting close to it, when Juror Vories comes in, so that we don't have to ask any questions, whether or not he would identify whether he wrote this letter to the news media—

The Court: No. No.

Mr. Chesley: —and I have one in his handwriting.

The Court: No. If it is in fact Juror Vories who did the examination, I want to examine him a bit more closely, but I am not going to get into what he did in writing letters.

Mr. Pecht: This is Mrs. Spicer.

(p. 721) The Court: Good morning, Mrs. Spicer. Nice to see you. Would you be more comfortable there?

Mrs. Spicer: Oh, O. K.

The Court: I just have a few questions from what I read in the newspaper and, since we are on the record, I do want it under oath.

Mr. Crawford, would you administer the oath to this witness, please?

DOROTHY AIERER SPICER, being first duly sworn, testified as follows:

Examination

By the Court:

Q. Mrs. Spicer, I read in the paper that one of the jurors had made some tests on the electrical connections in his house. Did anyone ever discuss that with you?

A. No.

Q. This was never a subject of deliberations of the jurors?

A. No, sir.

Q. O. K. This is a pamphlet entitled Reconstruction of a Tragedy. Do you recall seeing that in the jury room?

A. Yes, I do.

Q. O. K. Did you by chance look at it?

A. I leafed through it. I really didn't read it, but I did look through it.

(p. 722) Q. O. K. Was this a subject of discussion among jurors?

A. No, not really. I don't think it was. I mean I didn't talk to anybody about it.

Q. O. K.

A. But I remember the book and I saw it, and I looked through it. But I really didn't read anything in it, and my mind was already made up before I saw that book.

Q. O. K. Mrs. Spicer, thank you, and it's nice seeing you again.

A. You are welcome.

Q. Oh. Do let me point out to you, you are not required to talk to the newspaper. If you wish, you may.

A. No, I don't.

Q. O. K. You are under no obligation to answer any of their questions or to discuss anything with them.

A. O. K.

Q. It's nice seeing you again.

A. Thank you.

(Juror excused.)

Mr. Pecht: Your Honor, this is Mr. Vories.

The Court: Hello, Mr. Vories, nice to see you again. Do sit down. You will be more comfortable there, I think.

Mr. Vories, I just wanted to ask you a couple (p. 723) of questions and just get some background. Since I am on the record, I do want to ask you some questions under oath.

Mr. Crawford, would you administer the oath to the witness, please?

JOHN ROLAND VORIES, being first duly sworn, testified as follows:

Examination

By the Court:

Q. O. K., Mr. Vories, it's my understanding that at some time during the trial you checked your electrical system in your home?

A. Yes, I did.

Q. Approximately when did that occur?

A. Sir, the first part of the trial. It come out and they was talking about aluminum wire wired to outlets was like a time bomb; it could go off any time, and they brought out slides and they was showing the outlet glowing and charring and they showed the studs burning; and that's why I went home and checked them that night. I didn't check the aluminum for tests or experiments or to see if it was safe. I was concerned with my family.

Q. O. K. When was your house built? Do you know?

A. In 1969.

Q. Was it built for you or—

(p. 724) A. No. They had like seven different models up there, and you could choose from any model, and I got whatever plot of land—

Q. O. K. What I mean is, you have been the only occupant of that house?

A. Yes, sir.

Q. O. K. And when you bought it, had it been under construction or was it still to be constructed or was it finished?

A. It was, I told them what kind of brick and all that stuff, and they built it. When it was finished they told me it was finished, and that's when I moved.

Q. Mr. Vories, what is your occupation?

A. Refrigeration mechanic for Coca-Cola.

Q. O. K. As such you do work on electrical systems?

A. Not wiring. Like tracing schematics and broken wire in a vendor or ice maker, something like that, but nothing to do with house wiring.

Q. Do you go out on the job and repair refrigeration equipment for them?

A. Yes, in the field, yes.

Q. And this deals with things like compressors?

A. Right.

Q. And other refrigeration equipment?

(p. 725) A. Right.

Q. O. K. What did you find when you checked the connections in your home?

A. I didn't find anything. I took my outlets out and I got me a flashlight and I turned my electric off, and I was looking for a receptacle that was charcoaling, like they said.

Q. Yes.

A. And then after I didn't see anything like that, I pulled the thing out and tried to tighten the screws, see if they was tight.

Q. O. K. And what did you find?

A. I found they was tight.

Q. O. K. Do I assume that you—I don't know what the technical term is. I know that the screw at the top

and at the bottom holds the connections inside of the receptacle.

A. Right.

Q. You took those off and pulled this out; is that right?

A. I pulled it out a quarter of an inch so I could get a screwdriver on the screw.

Q. Right. And then you checked the binding head screw?

A. Right.

(p. 726) Q. O. K. Incidentally, please don't be nervous.

A. I am nervous.

Q. Well, you shouldn't be. I am not trying to assess blame or anything. I am not sure you have been—

A. Well, what I did, I didn't think I was doing anything—

Q. Mr. Vories, I don't think that you did anything wrong and I don't want you to be nervous. I am just trying to get some factual background, O. K.

And that was early in the trial? My recollection is that the slides were part of Mr. Aronstein's--

A. Right.

Q. —testimony?

A. Yes, uh-huh.

Q. O. K. And when you then found these things,

whatever you found, did you then mention this to any of the jurors?

A. Well, I can remember when we went upstairs with a break or something—I don't know why I come up—I said, "Well, I had aluminum in my house and I had checked a couple of outlets and I found my terminals to be tight," and that's the last time—first time and last time it was ever said.

Q. O. K. Do you remember to how many jurors you mentioned this?

(p. 727) A. It's like—I really don't know. If somebody was within earshot of what I said, I guess they heard it. Except for what I said, but I didn't elaborate. I didn't tell them I was checking the outlets for the safety of my family, which I did do.

Q. Right.

A. I didn't think it had no bearing on the case whatsoever.

Q. O. K. Mr. Vories, let me tell you something. The second day of this trial I went downstairs and checked my wiring too. I didn't check with a binding head screw, but I found out that my wiring was copper.

You said that you mentioned this once. This was early in the trial?

A. Early in the trial.

Q. O. K. And it was not mentioned thereafter; is that right?

A. It was never mentioned again.

Q. And it was not a subject of any discussion that you can recall?

A. Nothing at all.

Q. All right. Mr. Vories, this is a pamphlet entitled Reconstruction of a Tragedy.

A. Uh-huh.

Q. Do you remember seeing this in the jury room?

(p. 728) A. I remember seeing it but I never got to look at it. The only thing maybe I was looking at, they was saying how pretty the fountain was. That's the only thing I seen I looked over his shoulder and saw the fountain. I never did get to read nothing in the book.

Q. O. K. And once again, Mr. Vories, please don't be upset or nervous. It just doesn't warrant that.

Let me tell you, you are not required to talk to the press. If you want to, you may, but you don't have to.

A. I won't.

Q. They have no right to interrogate you and, above all, no lawyer may question you without my permission and I am not about to give that permission.

It's nice to see you again.

A. Yeah.

Q. I think that the jury was a good jury and, frankly, I enjoyed that case and I enjoyed by contact with you. O. K., thank you very much.

A. Uh-huh.

(Juror excused.)

Mr. Chesley: Your Honor, for the record—

The Court: Yes.

Mr. Chesley: —we would have wanted to have asked how many receptacles he took out and, also for the record, we wanted to find out relative to (p. 729) the information that was contained in the letter which had been represented to us as having been written by him.

The Court: Well, in neither event do I consider it significant for my purposes and, gentlemen, I am just not going to have somebody feel that he has incurred the wrath of the United States District Court. The man was obviously nervous.

Mr. Chesley: Scared.

The Court: And I don't want him to be.

Mr. Pecht: Judge, this is Mrs. Kremer.

The Court: Mrs. Kremer, how are you? Do sit down.

Mrs. Kremer: O. K.

The Court: It's nice to see you again.

Miss Kremer, I read the newspapers too and there were some questions that I thought I just ought to ask some of the jurors and, since it is part of the record, I would like to do it under oath.

Mrs. Kremer: O. K.

The Court: Mr. Crawford, would you administer the oath to Mrs. Kremer, please?

MARY A. HEIL KREMER, being first duly sworn, testified as follows:

(p. 730) *Examination*

By The Court:

Q. Miss Kremer, I am told that one of the jurors did some checking of his own wiring system. Before you read that in the paper, were you aware of that fact?

A. Yes, sir; I was.

Q. Can you tell me the circumstances that caused you to be aware of that?

A. Yes. John told me.

Q. John is Mr. Vories?

A. John Vories.

Q. Right.

A. Told me that he had had aluminum wiring in his house and that he just took out a couple of receptacles just to check them.

Q. I see. When did he tell you that? Do you recall?

A. Yes. It was during deliberations.

Q. During deliberations, O. K. And did he tell you what the results of his test were?

A. He just said that he found that all his screws were tight.

Q. O. K. Is that the only time you can recall talking to anyone about this?

A. Yes, it is.

(p. 731) Q. O. K. Was this said to you personally or was it said with a group of people there? Do you recall?

A. It was just, John and I were looking over the artifacts that were sitting on the table, and it was just him and I. To my knowledge, I think I was the only person that heard it. I am not sure though.

Q. Do you recall ever hearing this before deliberations started from him?

A. No.

Q. O. K. This is a pamphlet I am holding up called Reconstruction of a Tragedy?

A. Uh-huh.

Q. Do you remember seeing this in the jury room?

A. Yes, sir.

Q. Did you by chance look at it?

A. Yes, I did.

Q. And was this a subject of discussion during deliberations?

A. No, not— No, the main topic was just the pictures and the receptacles that Dr. Aronstein had tested.

Q. That was the discussion in the jury?

A. Yes.

Q. Not in regard to this pamphlet; is that right?

A. Yes.

Q. That was separate from this pamphlet?

(p. 732) A. Yes. I read that on my own, parts of it. I flipped through it.

Q. O. K. But do I understand what you are saying that this, however, was not a subject of discussion among the jurors?

A. No.

Q. O. K. Miss Kremer, thank you. Nice seeing you again.

A. Yes.

Q. Oh. You are not under any obligation to talk to the press.

A. O. K.

Q. If you want to, you may, but they have no right to ask you questions and require you to answer them.

A. O. K.

Q. Thank you. Take care.

(Juror excused.)

Mr. Pecht: Judge, this is Mrs. Knapp.

The Court: Mrs. Knapp, how are you today?

Mrs. Knapp: Fine.

The Court: It's nice to see you again.

Mrs. Knapp, I read the newspapers, like everybody else, and I decided I really ought to talk to the jurors and ask you some questions and, since I am doing it as part of the record, I would like to (p. 733) have the answers under oath.

Mr. Crawford, would you administer the oath to this witness, please?

ALVINA HUBER KNAPP, being first duly sworn, testified as follows:

Examination

By The Court:

Q. Mrs. Knapp, I read that one of the jurors had made some tests on the aluminum connections in his house. Before you saw it in the paper were you aware of that?

A. I heard him say he had tested to see if the screws were tight on some of his devices.

Q. O. K. And was this Mr. Vories?

A. Yes.

Q. When do you recall him saying that?

A. Well, it was—To be truthful, I don't know. I would say somewhere maybe beginning or middle of the trial.

Q. O. K. I asked the wrong question.

A. Oh, I am sorry.

Q. That's all right. You really answered it. My question was: Was it during deliberations or before deliberations?

A. Oh, it was before.

Q. It was early in the trial that you recall?

(p. 734) A. Earlier, yes; not deliberations.

Q. And was it just the once that you remember him saying that?

A. I don't remember more than once.

Q. O. K. Do you recall whether that subject was raised during deliberations?

A. I did not hear it if it was.

Q. O. K. Let me ask you something else. This is a pamphlet called Reconstruction of a Tragedy.

A. (Nodding.)

Q. Do you remember seeing that in the jury room?

A. Yes, I do.

Q. Did you look at it?

A. I looked at the pictures.

Q. O. K. Do you recall whether or not this pamphlet was the subject of discussion during deliberations?

A. I didn't hear it discussed.

Q. O. K. Thank you. That's all I wanted to know.

A. O. K.

Q. Oh, Miss Knapp. You are not required to talk to the press.

A. Oh.

Q. If you want to, you may.

A. I don't want to.

(p. 735) Q. O. K. Well, they can't make you.

A. O. K.

Q. And you don't have to answer any of their questions.

A. I don't.

Q. O. K. It's nice seeing you again.

A. O. K.

(Juror excused.)

Mr. Pecht: Your Honor, this is Mr. Ziegler.

The Court: Good morning, Mr. Ziegler. Nice to see you again.

Mr. Ziegler: Same here.

The Court: Do sit down.

Mr. Ziegler: Sure.

The Court: Like everybody else, I read the newspapers—

Mr. Ziegler: Unfortunately, yes.

The Court: —and I thought that I ought to talk to the jurors and, since it's on the record, why, I would like to do it under oath.

Let me ask Mr. Crawford to administer the oath to you, please.

Mr. Ziegler: Sure.

The Court: Mr. Crawford.

(p. 736) KENNETH LEO ZIEGLER, being first duly sworn, testified as follows:

Examination

By The Court:

Q. Mr. Ziegler, I read in the paper that one of the jurors had checked his aluminum connections, the connec-

tions in his house. Before you read it in the paper were you aware of that fact?

A. Yes.

Q. O. K. Do you recall approximately when you heard that?

A. As I explained to the guy Saturday—Friday—Well, let me get something straight. I did not confirm this; what I confirmed to was that he had aluminum wire in his house.

Q. Right.

The Kentucky Post, believe me is the last time I ever talk to them. Everything he completely said was inadequate to what I was agreeing to.

Q. All right. Please don't feel that you did anything wrong, Mr. Ziegler.

A. Believe me, I was very offended when I read the paper.

Q. This happens with some frequency. Newspapers do not necessarily listen as closely as they ought to.

(p. 737) A. They sure don't. I thought the reason he came to my verdict—

Q. Well, nobody has a right to ask you, absolutely no one can ask you why you reached your verdict.

A. That's what I thought he was after.

Q. Was it before deliberations or during deliberations?

A. Way before deliberations, O. K.; and as I did explain Saturday to the Enquirer, that it wasn't tossed

out to me. It was 18 of us. Maybe they all weren't there at the time, but it was before we started the trial, I recall him saying.

Q. Excuse me. Before you started deliberations?

A. No; way before we started on like 8:30 trial.

Q. O. K.

A. When we all was there.

Q. Right.

A. I remember him tossing it out, not to me, just in a conversation that "I checked my aluminum wiring last night," something like that. He didn't go into detail. I didn't know if he checked one, if he checked two, if he pulled the plugs or what he did, if he tightened the screws, what he did. It wasn't directed to me. It was just a conversation I heard him throw out. When you are there 37 days with 18 people, 18 walks of life, you talk about things, and (p. 738) I didn't think anything of it at that time, and I still don't.

Q. O. K. I assure you, Mr. Ziegler, that I am not trying to find fault, and I just want to get some background.

A. Yes.

Q. Did he say what the results of his test were?

A. No, he did not. Like I said, it was indirect, indirect question or answer, whatever you want to put it, and I didn't even think of it any more. As a matter of fact, I forgot it until they asked me that, and I said I frankly didn't recall throwing it out.

Q. When you say he asked, you mean a reporter?

A. Yes, from the Enquirer.

Q. O. K.

A. He also told me that the letter was signed by John Vories who, because I didn't get a chance to read the letter until after I got a chance to read it, until it was in the paper that Saturday. I didn't think anything directly about that letter because the Kentucky Post didn't mention anything to me Friday about it.

Q. I see. This was a letter that was published in one of the newspapers—

A. Yes.

Q. —presumably by a—

(p. 739) A. Judge, according to him, it was from John Vories, he told me.

Q. All right. And your recollection is that the only time this was mentioned was early in the trial?

A. Way early. It may have been day three. I mean—I don't even—It was way back.

Q. O. K. All right, and it was not brought up during deliberations to your recollection?

A. I did not hear a word of it.

Q. O. K. Let me ask you another question. I have got a pamphlet here called Reconstruction of a Tragedy.

A. Yes.

Q. Do you remember seeing that in the jury room?

A. I sure do, right up on the main table.

Q Did you look at it?

A. I sure did.

Q. O. K. And was it a subject of discussion by the jurors?

A. The only two that I can remember looking at it was Miss Mary Kremer—

Q. Yes.

A. —and I was the first one to have it. For some reason I sat down, it was staring right at me there, and what I was looking at mainly was to try to find when the fire was first indicated; and I read the articles on Mrs. (p. 740) Druckman, when she noticed the fire, went out in the bar-room. Then she went in the Zebra Room and said, "Hot, hot," and then the hot smoke, and then that section on.

I did see other things in the beginning, but I was looking for mainly the beginning of the fire and what took place from then on, what I was looking for, because I do remember some of that was brought up and I was really interested in that particular area, what went on on the first initial point of the fire notice at 8:45 and then when the fire department was called at 9:01, stuff like that.

I did see other stuff in the beginning of it, but it didn't mean anything to me.

Q. Mr. Ziegler, was this the subject of discussion among the jurors, this pamphlet?

A. Me and Mary—That's the only other person that I remember that we really got involved in it, was us two.

Someone may have overheard us talking about it but, as far as saying, "Hey, on page 6 we got this," you know, "what do you think about it?" no. I do remember reading the part about her discovering the fire. I think I read that out loud, but everybody was really involved in other issues of their own mind, I guess, what they were really interested in in the morning session, and really it was just the first two hours or hour and a half that I really was looking at that.

(p. 741) And then I remembered looking over a lot of artifacts on the table and I remember going downstairs before we went to lunch. As a matter of fact, I think I was downstairs when we went to lunch and I came up and got my coat and we went downstairs and waited for the marshal.

It was in the first hour and a half that I was looking at that because it was the first thing in front of me when I set myself down there, and I could remember a lot of articles and information brought out on that book, and I thought it was a very interesting book at the time that I was looking at it.

Q. All right. And as I said before, you are not obligated to talk to the press. If you want to—

A. There is no way.

Q. All right, but they are not entitled to talk to you if you don't want to. Mr. Ziegler, thank you, and it's nice seeing you.

A. Yes.

Q. I don't want you to think that there is anything you did wrong.

A. Well, I didn't think I did.

Q. O.K.

A. I thought it was—

Q. Nice seeing you. Take care.

(Juror excused.)

(p. 742) Mr. Pecht: This is Mrs. Fugate.

The Court: Good morning, Mrs. Fugate. Nice to see you again.

Mrs. Fugate: Nice to see you.

The Court: I just wanted to ask you a few questions about what I read in the paper and, since I am making a record on this, I would like to do it under oath.

Mr. Crawford, would you administer the oath to this witness, please?

EDITH GODSEY FUGATE, being first duly sworn, testified as follows:

Examination

By the Court:

Q. Mrs. Fugate, I read in the paper that one of the jurors had looked at his own wiring system. Before you read about that in the paper did you hear that?

A. No, I never did hear it.

Q. You didn't hear it?

A. No.

Q. At any time?

A. At no time.

Q. O. K. And it was not a subject of the discussion during your deliberations?

A. No, unh-unh. I was sitting down about three (p. 743) from the—no, two from the end of the table; and the man, some of them were up at the end, but I did not hear it at any time.

Q. O. K. This is a pamphlet entitled Reconstruction of a Tragedy. Do you remember seeing it in the jury room?

A. No, I don't. I didn't read a lot of the books.

Q. O. K. You don't even recall seeing it?

A. No, unh-unh, I didn't.

Q. Do you recall whether it was the subject of discussion during deliberations?

A. No, unh-unh, not that. Mostly the pictures we looked at and the parts, things they showed us.

Q. The separate photographs, not the photographs—

A. Not that, no. No, I did not see that book.

Q. Mrs. Fugate, thank you.

A. Yes, sir.

Q. Let me tell you, you are not required to talk to the press. If you want to, you may.

A. I never.

Q. Well, you are not required to and they can't ask you questions, and you are not required to answer them.

A. I got about 20 phone calls and my children, my (p. 744) son took the phone call and said, "Don't call Mom back. She is not talking to you." So that's the way it went.

Q. It's nice to see you again, Mrs. Fugate.

A. You too, and thanks for the folder and things you sent us.

Q. Thank you for your services.

A. I appreciate it.

(Juror excused.)

Mr. Pecht: Your Honor, this is Mrs. Huesing.

The Court: Good morning, Mrs. Huesing. How are you?

Mrs. Huesing: Fine.

The Court: Do sit down. Nice to see you again.

Mrs. Huesing: Thank you.

The Court: Mrs. Huesing, I read the newspapers too and I decided I really ought to ask the jurors some questions.

Mrs. Huesing: Glad you do.

The Court: And I want to do it for the record, so I will ask you to do it under oath.

Mr. Crawford, would you administer the oath to Mrs. Huesing, please?

AUDREY M. HUESING, being first duly sworn, testified as follows:

(p. 745) *Examination*

By the Court:

Q. O.K. I read that one of the jurors had made some tests on his own wiring. Before you read that in the newspaper were you aware of that fact?

A. John mentioned it early in the trial. This is why I am glad you called us in, because I had a reporter call me and I didn't want to talk about it, and he assured me Judge Rubin said it was all right; and he was taking a survey.

And he said, he asked if I knew of any kind, you know, anything to do with aluminum wire; and I said, "Well, it seems like I heard it." I was scared to talk. And I said, "It seems like I heard something like that."

And he said, "Well, who was it?"

And I said, "Well, I really don't know. It seemed like I heard that."

He said, "Was it John Vories?"

And I thought, well, he has got the name, so I might as well admit it. I said, "Yeah, it was John."

And he said—Now, here is where I am mixed up. I don't know whether he said it was brought up in the deliberation room or if it was brought up in the jury room.

Q. Yes.

A. But in my mind, I thought he said the jury (p. 746) room.

Q. Yes.

A. And he says that was when it was brought up and it was the early part of the trial and he didn't make any

tests. He just said he tight—He checked to see if his was tight.

Q. Screws?

A. Binding head screw.

Q. I see.

A. That's all he said to me.

Q. O. K.

A. That had nothing to do with my decision.

Q. O K. I don't want to know what your reasons were, Mrs. Huesing.

Why, was it said to you personally or in a group that he had tested his binding head screws?

A. I don't know how many was listening. It seemed like it was, you know, a group. I mean I don't know who heard it.

Q. It wasn't a conversation directly with you; is that right, just the two of you?

A. I think it was more like a little joke, I mean. No, it wasn't—I didn't take it as a test at all.

Q. O. K. This was early in the trial, you recall; is that right?

(p. 747) A. Uh-huh.

Q. Was the subject brought up during deliberations?

A. No. Now, this is where I am mixed up with because the reporter—

Q. Yes.

A. —might have said deliberations room. I don't know.

Q. I don't care what the reporter asked you.

A. I know, but this worried me all week.

Q. It just shouldn't. That's all. Please don't be worried. Other than the fact that the subject was in the newspaper I didn't read what each juror said, and I really don't care.

A. Uh-huh.

Q. I am just trying to get some background.

Your recollection is that it occurred, you heard this way before deliberation; is that right?

A. I can tell you about the time when they were— It was the first part of the trial—

Q. Right.

A. —when he said it was so dangerous in the walls, you know, if the screws weren't tight.

Q. O. K.

A. And it seemed like it was about the next day (p. 748) after we first heard that. Then you say: "Don't make up your mind about it. You haven't heard the other side or anything."

Well, it was the very first part of that trial.

Q. All right. And you are sure it was not then brought up again during deliberations?

A. No. The only thing—

Q. O. K.

A. —that was brought up during that, I mean I was looking at the receptacles that they had taken out of the Beverly Hills; and I know John says, "Well, finally we get to see the real receptacles," and he was just checking them over.

Q. O. K. But he did not mention again—

A. No, nothing about this.

Q. —about what he had done in his own home?

A. Not to me.

Q. All right. Let me ask you another series of questions. This is a pamphlet entitled Reconstruction of a Tragedy. Do you remember seeing that in the jury room?

A. I think it was up there.

Q. Did you look at it?

A. No.

Q. O. K. Do you remember whether that was the subject of any discussion by the jurors?

(p. 749) A. Not that I recall.

Q. O. K.

A. I don't remember it.

Q. Good enough. That's all I wanted to know. Thank you very much. It's nice to see you again.

A. Well, I am glad you called us over. I feel bad, you know.

Q. Please don't. Please don't. There is nothing that you did that was wrong, and you are not the first person to be asked by newspapers who may or may not have gotten—

A. Well, I am not going to talk to them, but now I know.

Q. Well, I do want to tell you, you are not required to. You do not have to talk to them. If you want to, you may.

A. Well, I didn't know that.

Q. Right. But you don't have to talk to the press.

A. The way he said he was taking a survey, and it sounded like it was kind of official, and I thought I'd better answer his questions.

Q. Well, from now on you don't have to.

A. Uh-huh.

Q. It's a matter of your own choice. And thank you. It's nice seeing you again.

(p. 750) A. All right. Thank you.

(Juror excused.)

Mr. Pecht: Your Honor, this is Mr. Akins.

The Court: Good morning, Mr. Akins. Do sit down.

Mr. Akins: Thank you.

The Court: Nice to see you.

Mr. Akins: Pleasure.

The Court: I read the newspapers too, and I decided that I really had better talk to each of the jurors about this

and, since I am doing this on the record, why, I thought it would be best if I did it under oath.

Mr. Crawford, would you administer the oath to Mr. Akins, please?

DANNY LEE AKINS, being first duly sworn, testified as follows:

Examination

By the Court:

Q. Mr. Akins, I read in the paper that one of the jurors had done some investigating of the wiring system in his house. Before that was in the newspaper did you know that had occurred?

A. No, sir; I didn't.

Q. O.K. You don't recall any conversation that (p. 751) you were in where that was mentioned?

A. No, sir.

Q. Even before deliberations?

A. No. I was completely ignorant to the fact until a reporter called me on the phone, and I had no knowledge of this.

Q. This was not a subject of discussion during deliberation; is that right?

A. To my knowledge, no.

Q. Right.

A. I heard no discussion. As I said, you know, in deliberations, I mean we were going through the artifacts

and trying to put together the pieces of the trial and, like I said, I heard nothing of any discussion of any type of test that he had done or anybody else had done for that matter.

Q. Your first knowledge was when you read it in the paper?

A. No. No. I was at home and I was preparing to go to work and a reporter called me on the phone and asked me to elaborate on what John Vories had done—

Q. Right.

A. —as for as tests, and I told—I said, "What can I tell you? You know, I don't know what you are talking about."

(p. 752) Q. O. K. Let me show you something. This is a pamphlet entitled Reconstruction of a Tragedy. Do you remember seeing this in the jury room?

A. Yes, sir.

Q. Did you look at it?

A. Vaguely.

Q. O. K.

A. Vaguely. I didn't read through it or anything. I just happened to—It played no part in deliberation at all as far as I was concerned.

Q. I don't want to know what—

A. O. K. I am sorry.

Q. Well, it's none of my business, truly—

A. O. K.

Q. —how you reached a decision. I just want to know: Was this the subject of discussion during deliberation that you recall?

A. To my knowledge, no, and I know not on my part; I didn't discuss anything that was in that pamphlet at all.

Q. Do you recall any of the other jurors during your deliberations mentioning the Reconstruction of a Tragedy?

A. No. I recall two particular jurors, Ken Ziegler and Mary Kremer, were looking at the booklet—

Q. Right.

A. —and discussing it among themselves.

(p. 753) Q. Right.

A. But it was not an open discussion to anyone else in the room, to my knowledge.

Q. O. K. Did you overhear what they were discussing about it?

A. No. No, because at that time I was going through some photographs and I was really examining the char pattern at that particular time, I remember distinctly, of the cubbyhole.

Q. Right.

A. And I was not aware of what they were elaborating on to any degree at all. I don't know what they were talking about.

Q. This was apparently not a general discussion among all the jurors—

A. No, sir.

Q. —is that right?

A. No, sir.

Q. And do I understand you are not even sure what they were talking about?

A. No, sir. I am not—

Q. Mr. Akins, what is your occupation?

A. Well,— I am service manager for Gillespie Wrecker Company. My brother-in-law and I was in the retail management. My brother-in-law bought the company and I went (p. 754) in kind of as a silent partner with him, and I run it at night.

Q. O.K. Well, I want to thank you. By the way, I want to thank you for your services as a foreman.

A. Uh-huh. Thank you.

Q. I appreciate the fact that you undertook that. And I do want to point out that you are not required to talk to the press. If you want to you may, but they are not entitled to ask you any questions and require you to answer them.

A. Right.

Q. And no one else is entitled to interrogate you if you don't want to be interrogated. But I did want to know what happened and, frankly, I now know and I don't have to rely upon what some newspaper reporter tells me what happened—

A. Right.

Q. —since I have talked to the jurors. And it's nice to see you again.

A. Thank you.

Q. I enjoyed the experience and I hope you did.

A. It was an experience.

Q. I just found it real nice to have 12 good people around, Mr. Akins.

A. I think we were.

(p. 755) Q. I do too. I think you were a good jury. Thank you.

A. Thank you.

Q. And I appreciate your coming over.

A. Yes, sir.

Q. Take care.

(Juror excused.)

The Court: Tell the marshal—

Mr. Pecht: Take them home?

The Court: Yes.

Mr. Chesley: Your Honor, may we just state something for the record?

The Court: Do anything you want.

Mr. Chesley: At this time, your Honor, we would request additional questioning of Mr. Vories in view of some of the testimony that's come here before, in view of possible inconsistencies in Mr. Vories' testimony.

Additionally, we would ask that additional questions be asked of Mr. Vories as to exactly what he did, how many

outlets or how many receptacles he inspected, the extent of the inspection and other details.

The Court: Mr. Chesley, I am simply not going to do it. The information that I thought was important to me to enable me to consider the motion that is before me I have received.

(p. 756) Mr. Chesley: Your Honor, I just wanted that for the record.

The Court: Now, how quickly, Mr. Crawford, can we have this typed up?

The Reporter: I will see if I can find a typist who can do it in a hurry, your Honor.

The Court: It would be appreciated since the lawyers are under a time schedule, as soon as it can be conveniently done. Let's see, we don't go back into the courtroom until next Wednesday.

The Reporter: I will try, your Honor.

The Court: Now, gentlemen, in terms of disposition: My inclination at this point is to instruct Mr. Crawford to make it avaailable to attorneys only, to provide me with a copy, which I propose to seal and make available in the event there is an appeal taken by either side. Is that agreeable?

Mr. Chesley: Yes, your Honor, but we would get a copy—

The Court: Yes.

Mr. Chesley: —and would it be permissible for us to use part of the information in our memorandum and, if

that be the case, then the memorandum should be filed in camera and copies just sent to counsel.

The Court: That's right.

(p. 757) Mr. Chesley: And not filed in the clerk's office.

The Court: That is correct.

Mr. Gilligan: On the logistics, could I make a suggestion, perhaps that when they have their responsive memorandum concluded and they are going to serve it, they usually just serve it on myself as coordinating secretary, and perhaps if I would serve ours on one representative of the aluminum companies; in that way perhaps it won't be going out to that many people, if that would help.

The Court: Look, you gentlemen work that out. I have some questions about it, Mr. Gilligan. I think it will raise more complaints than it will settle.

What I think then I will do, you may be assured that I will also include in the sealed record copies of the memoranda, for whatever value that may have, but at least it will then become part of the record and the appellate court, if necessary, can review it.

Mr. Gilligan: Judge, on that issue, ordinarily there is a requirement that we serve all counsel. May I ask that we not be required to do that in this case, that is counsel—

The Court: Mr. Gilligan, I am not going to do that.

Mr. Gilligan: As to the other defendants not in (p. 758) the aluminum group is what I am referring to.

The Court: Oh, O. K. The only ones you need serve are those counsel representing defendants in this phase of the trial—

Mr. Gilligan: Right.

The Court: —and who were still in the case when it went to the jury.

Mr. Gilligan: That's right.

Mr. Brown: What again is our time schedule?

The Court: Mr. Chesley's is due by the 12th and—

Mr. Stein: And you said the 21st.

The Court: You have then 10 days thereafter.

Mr. Stein: Fine.

The Court: I am hoping that I can dispose of this by the end of March. At the moment I do not propse to hold oral argument. It is possible I may change my mind and, if so, I will notify you.

Mr. Chesley: We can request it on our memorandum?

The Court: Feel free. Gentlemen, thank you.

(Hearing concluded at 10:30 a.m.)

(p. 759)

REPORTER'S CERTIFICATE

I, Robert I. Crawford, Official Court Reporter for the United States District Court for the Southern District of Ohio, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Robert I. Crawford

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT CONVENTION

IN RE:

BEVERLY HILLS FIRE LITIGATION

THIS DOCUMENT RELATES TO:

ALL CASES

MEMORANDUM REGARDING JUROR INQUIRY

Lord Mansfield in *Vaise v. Delaval,* 1 Term Rep. 11, first laid down the general rule that a juror may not impeach his own verdict. In *McDonald & United States Fidelity & Guarantee Company v. Pless,* 238 U.S. 264 (1915), the Supreme Court of the United States stated "the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their own verdict." *Id.* at 269. However, the *McDonald* Court also said, in dicta at 238 U.S. 267-269, that there might be other instances when a jury's testimony should be heard, and therefore, it avoided formulating an inflexible rule. Several of the United States Circuit Courts of Appeal adopted and enforced varying rules consistent with the holding of the Supreme Court in *McDonald,* supra, which permitted jurors to testify in certain circumstances. Cf: *Orenberg v. Thecker,* 143 F. 2d 375 (D.C. Cir. 1944) and *Lohr v. Tittle,* 275 F. 2d 262 (10th Cir. 1960).

The Sixth Circuit also adopted its own exception to the general rule announced in *McDonald,* supra:

> "Generally, the juror's testimony will not be received, either to impeach or support a verdict, but it may be received if it relates to extraneous influences brought

> to bear upon the jurors; they may show by their testimony what the extraneous influence was, and whether it was of a nature calculated to be prejudicial." *Stiles v. Lawrie,* 211 F. 2d 188, 189 (6th Cir. 1954).

The Sixth Circuit has reaffirmed its holding in *Stiles,* supra, on many other occasions. *Womble v. J. C. Penney Co.,* 431 F. 2d 985 (6th Cir. 1970) and *Stephens v. City of Dayton, Tennessee,* 474 F. 2d 997 (6th Cir. 1973).

The exception carved out by the Sixth Circuit in the above cases to the general rule that jurors may not impeach their own verdict, is similar to a provision in Rule 606(b), Federal Rules of Evidence, which states:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except* that a *juror may testify* on the question whether *extraneous prejudicial information* was improperly brought to the jury's attention or *whether any outside influence* was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

Thus, Rule 606(b) adopts the previous position of the Sixth Circuit in permitting testimony concerning extraneous prejudicial information which was improperly brought to the jury's attention.

In *Kilgore v. Greyhound Corporation, Southern Greyhound Lines,* 30 F. R. D. 385 (E. D. Tenn, 1962), the Court was faced with a motion for a new trial. One of the bases upon which the motion was made was the alleged miscon-

duct of a juror who allegedly visited the scene of the accident, conducted an experiment to determine the authenticity of facts adduced from the witness stand and then sought to influence his fellow jurors with the conclusions he had reached. This motion for a new trial was supported by the affidavits of two (2) jurors, one of whom stated that the statements made by the experimenting juror had no effect on him, while the other juror's affidavit was silent as to any effect which the extraneous information had upon her. The Court, in recognizing the rule adopted and enforced by the Sixth Circuit in *Stiles, supra,* determined that:

> "In the case at bar the court had no way of ascertaining the truth of the matter without allowing a limited departure from the general rule. The court felt that the least public injury would result in determining from the allegedly offending juror the facts as to the nature and extent of his purported misconduct, because in this way the court could appraise the character of the extraneous influence on the jury and decide whether it was of such nature as might have reasonably been prejudicial to the plaintiff Kilgore. The court perceived its duty to be the ascertainment of whether the verdict reached by the jury was in any other way than by a conscientious observance of the oath each juror took to decide the case well and truly on the law and the evidence." *United States v. Brandenburg,* C. A. 3rd, 162 F. 2d 980, 983.

The Court continues in its opinion at 30 F. R. D. 388-389:

> "This juror also admitted that he undertook to recount his experience the following day when all the jurors had reassembled to continue their deliberations; whereupon, the jury foreman immediately reminded him that he was not to bring in evidence from outside the courtroom; that he should not consider such himself; and that all the jurors should disregard what the

> Juror Deal had said and not consider such extraneous matter in arriving at their verdict. Deal stated flatly that his excursionary experiences did not influence his own verdict; and of the two affidavits submitted by counsel to impeach the jury verdict, one flatly states that Deal's statement, 'Would have no effect on me,' while the other affiant is silent on the question of whether such improper discussion had influenced her vote against the plaintiff."

The Court in *Kilgore* determined that there are instances when, in order to determine whether extraneous information was prejudicial to a party, it is necessary to make an inquiry not as to the effect of the extraneous information but whether there was *any* effect at all.

Rule 606(b) prohibits a juror from testifying as to any matter or statement occurring during the course of jury deliberations or to the effect of anything upon his or any juror's mind influencing him to assent to or dissent from the verdict. What the rule attempts is to prevent inquiry into the mental processes of the jury in reaching a verdict. As stated in the "Notes of Advisory Committee on Proposed Rules" with regard to Rule 606(b):

> "Under the Federal Decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other features of the precess."

Consistent with the approach taken by the Court in *Kilgore, supra,* while this Court should adhere to the provisions of Rule 606(b), it is the belief of this defendant that since an inquiry as to whether "extraneous prejudicial information was improperly brought to the jury's attention" there must be an inquiry is prescribed by Rule

606(b), to determine whether the information was in fact prejudicial. To simply limit the inquiry to an examination of extraneous information would be to disregard Rule 606(b). For these reasons, defendants submit that this Court, in analyzing Rule 606(b) in view of pre-Rule 606(b) decisions within the Sixth Circuit and in the interests of justice should inquire and permit the jurors to respond as to whether any alleged extraneous information brought to their attention had *any* effect. The Court should not permit inquiry into the *specific* effect any extraneous information had.

This case involves allegedly extraneous prejudicial information and consequently falls under one of the two exceptions expressed in Rule 606(b) which permit a juror to testify on whether that allegedly extraneous prejudicial information was brought to the *jury's* attention. It has not been alleged in any of the affidavits or motions filed by plaintiffs that there was an outside influence which was improperly brought to bear upon any juror. The latter was the situation in *Krause v. Rhodes*, 570 F. 2d 563 (6th Cir. 1977), in which plaintiffs in this case have placed considerable reliance in their motion for a mistrial. That case dealt only with an alleged threat to a juror which was communicated at some point by the Court to the entire jury. The Sixth Circuit found that the Court should have individually interrogated each juror to see if this threat would have any effect on his continued presence as a juror in the case. *Krause*, since it involved an outside threat to one or more jurors (which threat was communicated to all jurors) does not address itself to the issue in the case at bar, whether extraneous prejudicial information which is brought to the jury's attention.

There are several cases which have dealt with extraneous information supplied by one of the jurors in a particular case. In *United States v. Marques,* 600 F. 2d 742 (9th Cir. 1979), four (4) individuals were on trial, having been charged with conspiracy to manufacture methamphetamine. One of the defenses consistently raised to the conspiracy charge was that the defendants did not know each other. Following trial and a conviction against appellants, an affidavit was presented by appellants stating that one juror, stated that she had observed four (4) of the criminal defendants getting into a car together during a Court recess. The Court of Appeals found that the affidavit and other supporting testimony was not grounds for further hearings by the District Court:

> "It does not say that the information was passed on to *all the other jurors,* that it was discussed, or that it was even considered by the jurors in their deliberations. In light of this *bare bones assertation* and the fact that appellants had the burden of persuading the trial court that the allegation warranted a new trial, or at least further inquiry, we cannot say that the court below abused its discretion in rejecting appellants' motion." *Id.,* at 747.

Similarly, in *United States v. Eagle,* 539 F. 2d 1166 (8th Cir. 1966), the Court refused to allow the defendant to subpoena and examine jurors. An affidavit by an attorney alleged that one juror realized during the course of the trial that the defendant had been charged with the shooting of two (2) other FBI agents in an unrelated incident. The Government presented the affidavit of the juror in question who admitted that during the trial he had speculated that the defendant was one of the men

charged in the FBI deaths. However, in his affidavit the juror stated that he did not discuss the speculation with any other juror and that it *did not affect his own decision in the case.* The Court of Appeals for the Eighth Circuit determined that:

> "Appellant's argument ignores a crucial fact: no contention has been made that Juror Long voiced his suspicions about appellant's identity *in the jury room.* In fact, by affidavit Long denies mentioning his speculation. This is fatal to appellant's position." *(Emphasis added)* 539 F. 2d at 1170.

The above cited cases require that any allegedly extraneous prejudicial information be brought to the jury's attention before it will be the subject of inspection by the Court. This is also the requirement of Rule 606(b) which specifically speaks of *the jury.* This is in contrast to the same rule as applicable to outside influences which are improperly brought to bear upon *"any juror."* It would seem from the drafting of Rule 606(b) itself and the cases which have relied upon it that allegedly extraneous prejudicial information (1) must be passed on to all other jurors or at least a substantial majority of them; (2) that is discussed by the jurors; or (3) considered by the jurors in their deliberations, *United States v. Marques,* 600 F. 2d 742 (9th Cir. 1979).

In light of these cases, defendant submits that this Court should question each juror concerning what information was passed to each individual juror, whether any discussions were had, the times of such discussions, and whether any of these discussions occurred during the jury's deliberations. In addition, if there were discussions, defendant submits that this Court must question

each juror as to the substance of each discussion, as only then can the alleged prejudicial effect be shown. In support of this last request by defendant, is *United States v. Duncan,* 598 F. 2d 839 (4th Cir. 1979), wherein the foreman of the jury, upon finding the defendant guilty, mentioned that one member of the jury during deliberations had been arguing Webster's definition of "motive" and intent. The foreman immediately told the jury that they were to rely on the Court's instructions and not on the dictionary definitions. Because of the totality of the circumstances and the fact that this misconduct was quickly remedied by the jury foreman, the Court held that it was not prejudicial to the defendant. 598 F. 2d at 866. The Court continues at 598 F. 2d 866 in saying:

> "The circumstances in which juror misconduct can occur are probably as varied as all of human experience. We have followed the view that the district court may deal with such claims as it feels the particular circumstances require and have only reversed for abuse of discretion."

Defendants would request this Court to use that discretion in inquiring of the jurors;

(1) whether any discussions took place;

(2) the content of any such discussions; and

(3) whether these discussions or any extraneous information had *any* effect on their deliberations (but no inquiry as to *the* effect it had).

END OF DOCKET